83-1531

No. _____

In The

Supreme Court of the United States

October Term, 1983

DONREY COMMUNICATIONS COMPANY, INC. d/b/a DONREY OUTDOOR ADVERTISING COMPANY,

Petitioner,

vs.

CITY OF FAYETTEVILLE, ARKANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

(1) Whether 23 U.S.C. § 131(g) requires payment of just compensation for the forced removal of outdoor advertising signs not protected by 28 U.S.C. § 131(c).

(2) Whether the First Amendment to the United States Constitution prohibits sign ordinances which uniquely burden national and regional advertisers and whether the First Amendment requires an evidentary finding that such sign ordinances are reasonably related to their stated purposes.

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vs.

CITY OF FAYETTEVILLE, ARKANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The petitioner Donrey Communications Company, Inc., d/b/a Donrey Outdoor Advertising Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Arkansas Supreme Court entered in this proceeding on October 17, 1983, as amended on December 19, 1983.

OPINION BELOW

The decision of the Arkansas Supreme Court is reported at 280 Ark. 408, 660 S.W.2d 900 (1983). The opinion of the Washington Chancery Court was not reported.

JURISDICTION

The opinion of the Arkansas Supreme Court was entered on October 17, 1983. A timely petition for rehearing was filed and in response thereto the Arkansas Supreme Court issued an amended opinion on December 19, 1983 which granted petitioner no relief. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

United States Code, Title 23:

> § 131. Control of outdoor advertising
>
> Because of the length of this provision, it is reproduced in the Appendix to this Petition pursuant to Rule 21.1(f) of the Rules of the Supreme Court.

Fayetteville City Ordinance No. 1747

Because of the length of this provision, the relevant portions are reproduced in the Appendix to this Petition pursuant to Rule 21.1(f) of the Rules of the Supreme Court.

Fayetteville City Ordinance No. 1893

Because of the length of this provision, the relevant portions are reproduced in the Appendix to this Petition pursuant to Rule 21.1(f) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

This litigation began on July 2, 1971, when the petitioner filed a complaint against the City of Fayetteville, Arkansas in the Chancery Court for Washington County, Arkansas. (T.2). In this action, the petitioner seeks a declaratory judgment and injunctive relief to prevent the city from enforcing its Ordinances No. 1747 and No. 1893. Ordinance No. 1747, as amended, limits the location of commercial outdoor advertising to property zoned C-2 and designated "thoroughfare commercial." Ordinance No. 1893 limits the size of free-standing signs to a maximum of 75 square feet. Petitioner maintains a large number of 300 square foot "poster panels" and 672 square foot "painted bulletins," standard billboard sizes, within the city. Appendix, p. A-1. An order by the trial court dismissing the petitioner's original complaint was reversed in *American Television Company, Inc. d/b/a Donrey Outdoor Advertising Company, et al. vs. City of Fayetteville*, 253 Ark. 760, 489 S.W.2d 754 (1973).

On January 14, 1977, the petitioner filed with the trial court a Second Amended Petition in Equity raising, *inter alia*, precisely the issues it now asks this Court to review, whether the city ordinances at issue violate the First Amendment to the United States Constitution (T.206) and whether the Federal Highway Beautification Act, 23 U.S.C. § 131 requires it be compensated for the forced removal of its signs. (T.210-212).

Affidavits were filed by the petitioner in support of its position (T.469-519, 523-527, 541-544 and 564-626) and by the city in its defense. (T.412-418, 423-427 and 691-750). Stipulations of fact between the parties were also submitted, including one which provided that:

> 1. None of the traffic accident reports prepared and maintained by the Fayetteville Police Department indicate that an off-site outdoor advertising sign was a contributing factor in any motor vehicle accident in the City.
>
> 2. If enforced as written, Ordinance No. 1893, as amended, would require the removal, without compensation, of existing off-site signs having a display surface area larger than 75 square feet, and would prohibit the future erection of any off-site signs larger than seventy-five square feet, in the City of Fayetteville.
>
> 3. Many of the off-site signs owned by Plaintiff, Donrey Communications Co., Inc., are located within six hundred sixty (660) feet of interstate or Federal aid primary highways and are designed to be viewed therefrom. (T.627-628).

On November 3, 1982, a Memorandum Opinion was entered by the trial court finding that "the challenged ordinances are not violative of plaintiffs' First Amendment rights of free speech" (Appendix, p. A-20) and that

there was no "requirement that removal thereof be compensated, by virtue of the Federal or State Highway Beautification Acts. . . ." Appendix, p. A-30.

A timely appeal followed in which petitioner raised as its first assignment of error the claim that "Fayetteville City Ordinance No. 1893 when read with City Ordinance No. 1747 violates appellant's First Amendment rights." Abstract and Brief for Appellant, Vol. II, p. 499. Petitioner challenged the trial court's fact findings and its conclusion that these ordinances did not constitute an unconstitutional taking of private property in its second and third assignments, respectively. In its fourth and final assignment of error, petitioner argued that "the chancellor's interpretation of the Federal and Arkansas Highway Beautification Acts is incorrect." Abstract and Brief for Appellant, Vol. II, p. 523.

In a 4-3 decision the Arkansas Supreme Court found no violation of the First Amendment and no statutory requirement for compensation. Appendix, p. A-1ff.

In response to the state court's cryptic discussion of the statutory requirements, petitioner filed a timely petition for rehearing stressing its argument under the federal act and citing an accompanying letter from the Federal Highway Administration in support of its interpretation. Appendix, p. A-70ff. The petition for rehearing was not granted but on December 19, 1983, the Arkansas Supreme Court issued an Amended Opinion explaining its earlier interpretation of the Arkansas Highway Beautification Act, while not elaborating on its affirmance of the trial court's reading of the federal statute. Appendix, p. A-13.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With Decisions of the California Supreme Court and the Federal Highway Administration As to the Proper Interpretation of 23 U.S.C. § 131.

The Federal Highway Beautification Act of 1965 establishes a joint federal and state mechanism for the "effective control" of outdoor advertising along "the Interstate system and the primary system" of this nation's public highways. 23 U.S.C. § 131(a). States failing to comply with the Act face a reduction in their federal-aid highway funds. 23 U.S.C. § 131 (b). *See, Vermont vs. Brinegar*, 397 F.Supp. 606 (D. Vt. 1974).

As amended in 1978, the relevant portions of the Act include subsection (c), which exempts traffic signs, landmarks and similar structures from regulation, and subsection (d), which authorizes the Secretary of Transportation and the states to agree to exempt other signs located in commercial and industrial areas. Most important is subsection (g), which provides, *inter alia*, that:

> Just compensation shall be paid upon the removal of any outdoor advertising sign, display or device lawfully erected under state law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section.

The petitioner pressed the argument before the trial court that this provision entitled it to "payment of just compensation for forced removal of signs adjacent to federal-aid highways." *See*, Appendix, p. A-29. Relying on *Ackerly Communications, Inc. vs. City of Seattle*, 92 Wash. 2d 905, 602 P.2d 1177 (1979), cert. denied, 449 U.S. 804 (1980), the trial court rejected this contention. In *Acker-*

ley Communications, Inc. vs. City of Seattle, supra, the Washington Supreme Court held that the Federal Highway Beautification Act could control signs in commercial and industrial areas only through agreements between the state and the Secretary of Transportation. In the absence of any controlling agreement, no compensation was required when signs were removed from such areas.[1] Most of the petitioner's signs are in areas zoned for commercial or industrial uses. *See,* Appendix, p. A-1, 2. The petitioner appealed the trial court's decision. The Arkansas Supreme Court, citing *Ackerley Communications, Inc. vs. City of Seattle,* affirmed the result below, although acknowledging a contrary result in *Metromedia, Inc. vs. City of San Diego,* 610 P.2d 409 (Cal. 1980), rev'd on other grounds, 453 U.S. 490, 101 S.Ct. 1817, 69 L.Ed.2d (1981).

The California Supreme Court, in fact, had ruled in *Metromedia, Inc. vs. City of San Diego, supra,* that a city ordinance requiring the removal of signs "existing or subject to litigation on November 6, 1978," the effective date of the 1978 amendments to the Federal Highway Beautification Act, was invalid to the extent it permitted removal of signs without compensation. In reaching this conclusion, the California Supreme Court first examined the language of the Act. Since subsection (d) required com-

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[1]In both *Ackerly Communications, Inc. vs. City of Seattle* and the present case, agreements between the State and the Secretary of Transportation had been reached but they did not cover the signs at issue. Appendix, p. A-30.

The effect of subsection (d) is merely to create a mechanism recognizing the states' interest in the regulation of signs in certain areas. No reference to just compensation is made in subsection (d), no exception to subsection (g) is created and no lack of federal jurisdiction is found.

pensation for the removal of signs not allowed by subsection (c) and since subsection (c) applied only to certain types of official and historic signs, the court concluded that "the literal language of the federal act therefore compels compensation." *Id.* at 423.

This conclusion was supported by the legislative history of the 1978 amendments. The California Court observed that according to the Report of the House Committee on Public Works and Transportation, the fact that certain signs might be protected by an agreement between the state and the Secretary of Transportation made no difference under subsection (g) when no agreement covering those signs existed. The Report found that "just compensation must be paid upon the removal of any lawfully erected sign which is not permitted under subsection (c)." Report, No. 95-1485, p. 16, U.S. Code Cong. & Admin. News, 1978, pp. 6575, 6592.

Because the 1978 legislation amended subsection (g) by merely inserting the phrase "not permitted under subsection (c)," it seems clear that since its passage in 1965, the Act required just compensation for forced removals. Prior to 1978, however, the FHA had interpreted the original Act to hold a sign not "lawfully erected" once it became a nonconforming use under local law. The 1978 amendment removed any ambiguity. *See, Metromedia, Inc. vs. City of San Diego, supra,* at n. 26. As a result ,the FHA, in a March 6, 1979 Memorandum, interpreted the 1978 amendments as clearly requiring "just compensation" for the removal of signs in place or subject to litigation prior to November 6, 1978, a position the California court acknowledged. *Id.* at p. 414. In fact, the Chief Counsel of the FHA had opposed the 1978 amendments before Con-

gress for just this reason. *Id.* at n. 27. Consistent with this later interpretation, the FHA has recently informed the Arkansas Department of Transportation that the court below misconstrued the federal law. *See,* Appendix, p. A-73.

As opposed to the straightforward interpretation of the statute made by the California Supreme Court and eventually made by the FHA, the Washington Supreme Court and the court below have adopted a strained reading which holds that the mere fact some signs could be regulated by agreement between the states and the Secretary of Transportation means that those signs are exempt from the "just compensation" requirement of subsection (g).[1] This conflict justifies a grant of certiorari to review the judgment below. *See, United States vs. Oregon,* 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961); *Citizens & Southern National Bank vs. Bougas,* 434 U.S. 35, 98 S.Ct. 88, 54 L.Ed.2d 218 (1977). *See also, California Department of Industrial Relations, et al. vs. Homemakers, Inc.,* 423 U.S. 1063, 96 S.Ct. 803, 46 L.Ed.2d 655 (1976) (White, J., dissenting from denial of cert.) (court should resolve conflict between circuits in determining compensation due under federal statute).

2. The Decision Below Violates the First Amendment to the United States Constitution.

The decision of the Arkansas Supreme Court upholds a broad geographical restriction on commercial outdoor

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[1]The California view was adopted in *Lamar-Orlando Outdoor Advertising vs. City of Ormond Beach,* 415 So.2d 1312 (Fla. App. 1982). But see, *Suffolk Outdoor Advertising Company, Inc. vs. Hulse,* 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1978) appeal dismissed 439 U.S. 808 (1979).

advertising and a prohibition of standard size commercial and noncommercial advertisements. These are regulations of the manner in which the right to freedom of speech guaranteed the petitioner, its clients and the public by the First Amendment may be exercised. Regulation of the noncommunicative aspects of noncommercial speech are constitutional if they do not unduly restrict the flow of information or ideas. *Cox vs. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). In a similar vein, though perhaps to a lesser extent, commercial speech is constitutionally protected. Government regulation of commercial speech is permissible, but it must be neutral as to content, serve a significant public interest and "leave open ample alternative channels for communication. . . ." *Virginia Pharmacy Board vs. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). When a message rises from a newspaper to a billboard, it is entitled to no less protection. *See, Metromedia, Inc. vs. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed. 2d 800 (1981) (striking down city ordinance restricting commercial outdoor advertising and certain forms of noncommercial advertising). Indeed, where, as here, expression takes place in a traditional public forum, a public highway, "more focused regulations of 'time, place or manner' are constitutionally compelled. . . ." *Tribe, American Constitutional Law* § 12-21 (1978). For at least two reasons, the ordinances upheld by the Arkansas Supreme Court may not survive scrutiny under these standards.[3]

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[3]Regulations not only infringing on freedom of speech, but threatening the survival of an otherwise lawful business would seem to demand very careful scrutiny, especially where amortization, rather than money damages, is the communicator's only relief.

First, the result below will severely burden those individuals seeking to advertise on the few billboards the ordinances would permit. The evidence was uncontradicted that replacing the posters on existing standard size billboards with posters for mini-billboards would increase costs by fifty percent. *See,* Appendix, p. A-6, 7. Admittedly, some restrictions on outdoor advertising are permissible. The Fayetteville ordinances, however, restrict such advertising in a most disturbing way, by discriminating against certain classes of advertisers. National and statewide advertisers print posters suitable for standard 300 square foot billboards; to advertise in Fayetteville, Arkansas, they would have to print posters to fit that city's mini-billboards. (T.593, T.602, T.612). National advertisers, be they automobile manufacturers, presidential candidates or charitable organizations, would face unique obstacles and increased costs in trying to bring their message to Fayetteville.[4]

Second, regulations affecting speech, even commercial speech, should be no greater than that necessary to achieve legitimate governmental objectives. *Central Hudson Gas & Electric Corporation vs. Public Service Commission,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). It would follow then that lawful regulation must be premised on an evidentiary record, formal or informal, which demonstrates at least a rational relationship between the stated objec-

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[4]According to the Affidavit of William R. Zifchak, the prohibition of standardized outdoor advertising poster panels in Fayetteville would eliminate the City from national outdoor advertising campaigns. Mr. Zifchak is President and General Manager of Out of Home Media Services, Inc. of New York City, New York and has worked in advertising for forty years. (T.523-525).

tives of a regulation and its provisions. The principal stated goals of the Fayetteville ordinances were to promote traffic safety and to preserve the local scenery. *See,* Appendix, p. A-4. Yet in this case, the parties stipulated that none of the traffic accident reports maintained by the Fayetteville Police Department indicated that outdoor advertising had ever been a factor in any reported traffic accident. These reports, prepared by the investigating officer, included a section for noting "vision blocked by signboard" and "inattention." (T.520). As to aesthetics, the Fayetteville ordinances ban outdoor commercial advertising in areas where drag strips, junk yards, stockyards, coal storage, manufacturing and meat slaughtering, among other indelicate activities, are permitted. (T.340-60). Rather than find as fact on this evidence that the city's ordinance did reasonably relate to lawful objectives, the court below relied on the plurality opinion by this Court in *Metromedia, Inc. vs. City of San Diego, supra,* which refused to declare various lower court decisions holding billboards unattractive traffic hazards "unreasonable." *Id.* at p. 509. At least one lower court, however, has recognized that such legislative pronouncements may be impermissibly broad. In *John Donnelly & Sons vs. Campbell,* 639 F.2d 6 (1st Cir. 1980), the court, in overturning a Maine billboard prohibition said:

> The statute's condemnation is universal, regardless of the nature of the ways, of the extent of the unimpeded view, and of particular traffic conditions. In the interest of workable enforcement, some overbreath is permissible, but the disparity here seems far from minimal. Moreover, we can think of no reason to believe that the signs which the statute permits will be any less distracting than some of those that are prohibited. *Id.* at p. 11.

This view is consistent with Mr. Justice Brennan's expressed reluctance "to accept legal conclusions in other cases as an adequate substitute for evidence *in this case* that banning billboards directly furthers traffic safety." *Metromedia, Inc. vs. San Diego, supra,* at pp. 521, 528 (Brennan, J., concurring). As to legitimacy of prohibiting billboards in commercial and industrial areas, Mr. Justice Brennan has recognized a need for regulators to establish that the prohibition was part "of a comprehensive coordinated effort in its (the city's) commercial and industrial areas to address other obvious contributors to an unattractive environment." *Id.* at 531.[5]

When due consideration is given to the restrictions Ordinances No. 1747 and No. 1893 impose on freedom of speech, and the need to demonstrate some reasonable basis for those restrictions, the result below becomes suspect. Although the plurality in *Metromedia, Inc. vs. City of San Diego, supra* at n. 14, cited various lower court rulings upholding sign ordinances, two subsequent state court decisions reach a different result. In *Eller Outdoor Advertising Company, et al. vs. City of Roseville et al.*, Macomb Co. Cir. Ct. No. 81-9378-AS (Mich. April 16, 1983), the court struck down on First Amendment grounds an ordinance limiting billboards to 300 square feet.[6] Recog-

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[5]"In individual and commercial areas, however, signs and billboards are but one of countless types of manmade intrusions on the natural landscape. Without denying some perceptible change for the better would occur even here, I question whether the margin of improvement obtained in these areas can really justify the state's decision to virtually eradicate commercial speech by sign and billboard." *John Donnelly & Sons vs. Campbell, supra,* p. 23 (Pettine, J., concurring).

[6]This decision has not been reported. For the convenience of the Court, a copy is reproduced in the Appendix to this Petition.

nizing that 672 square foot painted signs represented a national standard, the court found that the 300 square foot limitation "severely restricts" advertisers who are regional and national in scope. Appendix, p. A-81. The Michigan court, noting that smaller, less readable signs might actually be more distracting than larger signs, found no relationship between size restrictions and traffic safety. Aesthetics alone was held not to be sufficient justification. Appendix, p. A-81. In *Patrick Outdoor Media, Inc. vs. Borough of Dickson City,* Lackawanna Co. Ct. Com. Pleas, 83 Civil 372 (Pa. Sept. 21, 1983), the court, acknowledging the existence of national standards in the industry, found that the effect of an ordinance limiting outdoor signs to 100 square feet "is to effectively exclude outdoor advertising from the municipality."[7] Appendix, p. A-91, 92. Since the evidence suggested outdoor advertising did not pose a traffic hazard, although this was the principal objective of the ordinance, the court ruled the de facto ban did not bear a "substantial relationship to the public health, safety, morals and general welfare. . . ."[8] Appendix, p. A-94.

These First Amendment issues justify a grant of certiorari to review the result below.

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[7] See note 6.

[8] "[T]here was no believable testimony that the [sign] ordinance is in any way related to the public safety." *Art Neon vs. City of Denver,* 357 F.Supp. 466, 471 (D. Colo. 1973) rev'd on other grounds, 488 F.2d 118 (10th Cir. 1973). *See, State ex rel Department of Transportation vs. Pile,* 603 P.2d 337 (Okla. 1979) (noting inconsistency of stated goals of promoting traffic safety and permitting motorists to view the countryside).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the Arkansas Supreme Court.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ARKANSAS

No. 83-67

DONREY COMMUNICATIONS CO., INC.
(FORMERLY AMERICAN TELEVISION CO., INC.
d/b/a DONREY OUTDOOR ADVERTISING CO.),

Appellant

v.

CITY OF FAYETTEVILLE, ARKANSAS,

Appellee

APPEAL FROM WASHINGTON CHANCERY COURT
THOMAS F. BUTT, Chancellor

AFFIRMED

Opinion Delivered October 17, 1983

ROBERT H. DUDLEY, Associate Justice

Appellant, Donrey Communications Company, Inc., maintains sixty billboards for commercial advertising and noncommercial messages within the City of Fayetteville. They are "off-site signs" as the advertising or message on each billboard is about something not sold or offered on the land where the billboards are located. They consist of "standard poster panels" which are twelve feet by twenty-five feet, or 300 square feet, and "painted bulletins" which are fourteen feet by forty-eight feet, or 672 square feet. Two Fayetteville ordinances restrict the size and location of appellant's billboards. One is a zoning ordinance and the other is a comprehensive sign ordinance.

The zoning ordinance, No. 1747, enacted in 1970, limits the location of billboards to property zoned C-2. Most of appellant's billboards are located on property zoned C-2, or thoroughfare commercial district, and a few are

located on property zoned C-3, central business district, or I-1, light industrial and heavy commercial district.

The comprehensive sign ordinance, No. 1893, restricts the size of both on-site and off-site freestanding signs to a maximum of 75 square feet and prescribes minimum setback requirements from street right-of-way for the signs. Appellant's billboards conform neither to the size restrictions nor to the setback requirements. Its billboards were erected from 12 to 24 years ago at a cost of $500 to $1,000 per sign and, at the time of erection, complied with all applicable ordinances.

Section 17B-5(A)2 of the sign ordinance provides that off-site nonconforming signs shall be removed or shall be altered to conform with the provisions of the ordinance by January 19, 1977, which was four years' amortization from the effective date of the ordinance. The zoning ordinance, in Art. 4, § 5(g), requires that nonconforming signs be removed by the same date.

This case was filed July 2, 1971, over twelve years ago and came to this court in 1973. *American Television Co., Inc., d/b/a Donrey Outdoor Advertising Co., et al vs. City of Fayetteville,* 253 Ark. 760, 489 S.W.2d 754 (1973). It was reversed, and the pleadings were amended to test the constitutionality of the city's restrictions of the size and location of billboards. On cross-motions for summary judgment the trial court upheld the billboard restrictions and amortization requirement, as applied to appellant, and granted the city's prayer for a mandatory injunction ordering appellant to comply with the two ordinances. We affirm the decree. Rule 29(1)(c) provides that the appeal of cases testing the constitutionality of a municipal ordinance shall be heard in this court.

Appellant first contends that, when read together, the two ordinances violate appellant's right under the First Amendment to the United States Constitution.

Billboards are noncommunicative structures designed to stand out and apart from their surroundings, but also they are a medium of communication warranting First Amendment protection. The government has a legitimate interest in controlling the noncommunicative aspects of the medium but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects. *Metromedia, Inc. vs. San Diego*, 453 U.S. 490 (1981).

Alexander Meiklejohn in *Free Speech and Its Relation to Self-Government* 27 (1948) wrote that the First Amendment "does not forbid the abridging of *speech*. But . . . it does forbid the abridging of *the freedom of speech*." He argues that the phrase "the freedom of speech" implies rules regarding procedure, or order. He used the New England town meeting as his model to demonstrate there could be no freedom of speech if everyone spoke at once but, at the same time, any argument relevant to the issue before the meeting, no matter how unpopular, is protected by the strong language of the amendment. In this context the Supreme Court of the United States has ruled that restrictions on time, place and manner are permissible if "they are justified without reference to the content of the regulated speech, . . . serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Virginia Pharmacy Board vs. Virginia Citizens Consumer Council*, 425 U.S. 748 at 771 (1976).

"The freedom of speech" is not a self-defining phrase. The speech which cannot be abridged is that which is protected. Nor is the word "abridging" unambiguous. What is protected and how extensively it is protected is determined on a case by case basis by the courts. *See* Wellington, *On Freedom of Expression,* 88 Yale L. J. 1105 (1979).

The ordinance, as applied to appellant, its advertisers and the viewers of the billboards are content neutral; they merely restrict their size, height and location. The ordinances seek to implement a substantial governmental interest and they directly advance that interest. *See Central Hudson Gas & Electric Corp. vs. Public Service Commission,* 447 U.S. 557 (1980) and *Metromedia, Inc. vs. San Diego,* 453 U.S. 490 (1981).

The preamble to the sign ordinance provides that the purpose of the ordinance is to promote the reasonable, orderly and effective display of signs, to promote safety and to preserve natural beauty. The city board of directors made the following findings:

> That the uncontrolled proliferation of signs is hazardous to the users of streets and highways within the limits of the city of Fayetteville, Arkansas.
>
> That a large and increasing number of tourists have been visiting the City of Fayetteville, Arkansas, and as a result the tourist industry is a direct source of income for citizens of said city, with an increasing number of persons directly or indirectly dependent upon the tourist industry for their livelihood.
>
> Scenic resources are distributed throughout the city, and have contributed greatly to its economic development, by attracting tourists, permanent and part-time residents, and new industries and cultural facilities.

> The scattering of signs throughout the city is detrimental to the preservation of those scenic resources, and so to the economic base of the city, and is also not an effective method of providing information to tourists about available facilities.

The goals which the city seeks to further are substantial governmental goals. This matter was laid to rest in *Metromedia, id.*, at 507, 508.

> Nor can there be substantial doubt that the twin goals that the ordinance seeks to further — traffic safety and the appearance of the city — are substantial governmental goals. It is far too late to contend otherwise with respect to either traffic safety, *Railway Express Agency, Inc. vs. New York*, 336 U.S. 106, 93 L Ed 533, 69 S Ct 463 (1949), or aesthetics, see *Penn Central Transportation Co. vs. New York City*, 438 U.S. 104, 57 L Ed 2d 631, 98 S Ct 2646 (1978); *Village of Belle Terre vs. Boraas*, 416 U.S. 1, 39 L Ed 2d 797, 94 S Ct 1536 (1974); *Berman vs. Parker*, 348 U.S. 26, 33, 99 L Ed 27, 75 S Ct 98 (1954).

Hand in hand with aesthetics is tourism, one of Fayetteville's important industries and a substantial economic resource.

The ordinances under attack are as narrowly drawn as is practically and legally possible and the city has gone no further than necessary to meet its goals. This type of ordinance directly advances the legitimate governmental interests in traffic safety, the aesthetic landscape and the tourism industry. *See Metromdedia, Inc. vs. San Diego*, id., p. 508, 509, 510 and 511.

The next First Amendment issue is, do the restrictions close a channel for communication? Initially, we note that this is not one of those cases where a channel of communication is completely prohibited in the name of

some governmental purpose, such as prohibiting the circulation of handbills under the rationale of preventing litter. *See Schneider vs. State,* 308 U.S. 147 (1939). Here, the billboard channel of communication is not prohibited, it is only limited as to size and place. The only questionable aspect of the limitation in size is that advertisements or messages which are prepared for nationwide and statewide distribution are prepared for the 300 square feet standard poster panels and they will be eliminated. The use of the standard poster panel allows an inexpensive form of communication. However, the appellant has not demonstrated that the size cannot be reduced to 75 square feet without unduly increasing the cost of this channel. The affidavit of Lloyd E. Schuh, Jr. is explanative:

> I develop and contract for all advertising by Educare Centers. Educare Centers has used standardized outdoor advertising poster panels on a regular basis since 1973. We now have 12-month contracts for outdoor advertising on standardized poster panels in all three cities where we operate.
>
> Educare Centers currently has its advertisements on 10 poster panels in Little Rock, 6 poster panels in Fort Smith and 1 poster panel in Fayetteville, I design seven different advertisements and have 20 copies made of each design. All 17 poster panels, including the one in Fayetteville, will carry identical advertisements with the seven designs being rotated during the year.
>
> By having 20 copies of each design printed, the average poster cost is $35.00. If I were forced to order single copies of each design in an oddball size for Fayetteville it would increase the cost of those copies by nearly 50%.

Increasing the average poster cost by 50%, or from $35 to $52.50 would not eliminate billboards as a channel of communication; it could only moderately affect the cost. The law is settled that "a municipality may enforce a rule that curtails the effectiveness of a particular means of communication." *Metromedia, Inc. vs. San Diego, id.*, at 550.

Similarly, in *Yarbrough vs. Arkansas State Highway Com'n.*, 260 Ark. 161, 539 S.W.2d 419 (1976), we rejected appellant's contention that the Highway Beautification Act., Ark. Stat. Ann. § 76-2501 et seq., deprived him of his right to advertise. We stated:

> We find that he has not been denied the right to advertise, but the right has been limited by valid restrictions. . . . Furthermore, appellants had no vested right to capitalize on the flow of traffic over Interstate 40.

Appellant makes an economic, or loss of income, argument but we decline to adopt that approach to the First Amendment. The First Amendment affords less protection to the medium than the message. *See* Kaufman, *The Medium, The Message And The First Amendment*, 45 N.Y.U. L. Rev. 761 (1970). We find the ordinances do not violate appellant's First Amendment rights.

Appellant's next point of appeal is that the trial court erred in granting a summary judgment in favor of the City and erred in refusing to grant summary judgment in its favor because (a) legislation which prohibits a lawful business is unreasonable as a matter of law, and (b) the declared purpose of the ordinance has no substantial connection with the real purpose.

Ordinances limiting the right to maintain billboards are not unreasonable as a matter of law. In *Board of Adjustment of Fayetteville vs. Osage Oil & Transportation, Inc.*, 258 Ark. 91, 522 S.W.2d 836 at 838 (1975), we stated:

> The outdoor advertising sign . . . is not maintainable as a matter of right; such signs have been prohibited altogether. See the extended discussion in *General Outdoor Advertising Co. vs. Dept. of Public Works*, 289 Mass 149, 193 N.E. 799 (1935).

Appellant also contends a genuine dispute exists over a material fact because the declared purpose is not related to the restrictions on the size and location of the billboards. This same argument was made and rejected in *Metromedia, Inc. vs. City of San Diego, supra.* In *Board of Adjustment of Fayetteville vs. Osage Oil & Transportation, Inc., supra,* we stated:

> The basic power of a municipality to regulate the size and location of billboards and other commercial signs has been sustained in so many jurisdictions that it would be a waste of time and effort to cite the cases. such regulations have been upheld upon many grounds, including the promotion of traffic safety, the control of potentially hazardous structures, and the fundamental considerations of city planning and city beautification that underlie the zoning concept itself.

Appellant points out that billboards are prohibited in districts zoned commercial and industrial but the following businesses are permitted there: dance halls, taverns, truck repair and service establishments, drag strips, meat slaughtering, auto salvage, junk yards, scrap metal, stockyards and wrecking and demolition services. From that, appellant contends that the zoning ordinance

bears no reasonable relationship is aesthetic considerations and, consequently, summary judgment should have been granted to appellant as a matter of law.

Perhaps dance halls, taverns, truck repair establishments, etc., arguably can be said to be ugly, but it does not follow that these businesses cannot be carried on among more pleasant surroundings. The city board obviously concluded that the appearance of the commercial and industrial districts would be aesthetically enhanced by the elimination of billboards. The ordinance bears a reasonable relationship to aesthetic considerations and is a direct approach to solving the problems created by the billboards.

Many courts have rejected the argument that it is unreasonable to prohibit billboards in commercial and industrial areas of little, if any, natural beauty. *E. B. Elliott Advertising Co. vs. Metropolitan Dade County,* 425 F.2d 1141 (5th Cir. 1970); *John Donnelly & Sons, Inc. vs. Outdoor Advertising Board,* 339 N.E.2d 709 (Mass. 1975); *John Donnelly & Sons vs. Campbell,* 639 F.2d 6 (1st Cir. 1980); *Metromedia Inc. vs. City of San Diego,* 610 P.2d 407 (Cal. 1980), rev. in part 453 U.S. 490 (1981) and *Metromedia, Inc. vs. City of San Diego,* 453 U.S. 490 (1981).

We affirm the granting of summary judgment in favor of the city and we affirm the denial of summary judgment in favor of appellant.

The appellant next contends that the chancellor erred in not finding that the sign ordinance and zoning ordinances in their amortization provisions amounted to a public taking of private property in violation of Art. 2 § 22, of the Constitution of Arkansas.

In two recent cases we held a similar amortization provision, as applied, was not a public taking of private property without just compensation. In fact, those cases dealt with the same ordinances, No. 1893, before the amendment. *City of Fayetteville vs. McIlrey Bank & Trust Co. et al,* 278 Ark. 500, 647 S.W.2d 439 (1983); *Hatfield vs. City of Fayetteville,* 278 Ark. 544, 647 S.W.2d 450 (1983); *see also* Gitelman, *Signs of the Times in Arkansas,* 1983 Ark. Law Notes 91.

The test to be used in determining whether an amortization requirement is constitutional is the test of reasonableness. *City of Fayetteville vs. McIlroy Bank & Trust Co., supra.* Appellant's sixty billboards were constructed from twelve to twenty-four years ago at a cost of $500 to $1,000 per sign. On the facts of this case the four year amortization period was fair. In addition, this litigation has prolonged appellant's signs by another six years.

Appellant additionally contends that, aside from the loss of its billboards, the ordinances constitute a public taking because they may render its business, as heretofore conducted, unprofitable. The argument is not convincing. There is no reason to treat the loss of a profit generated by a competitive monopoly on nonconforming billboards any different that we treat the loss of the asset. The principle of amortization rests on the reasonable exercise of the police power and the financial detriment imposed upon a property owner by the reasonable exercise of police power does not constitute the taking of private property within the inhibition of the constitution.

Appellant's final point is that the Arkansas Highway Beautification Act, Ark. Stat. Ann. § 76-2501, et seq., pre-

cludes the city from requiring the uncompensated removal of its billboards which are adjacent to federal aid highways. The act was adopted to provide effective control of outdoor advertising within 660 feet of federal aid highways and to conform with the Federal Highway Beautification Act of 1975, as amended, 23 U.S.C. § 131. It provides that no municipality shall remove any outdoor advertising without paying just compensation. Ark. Stat. Ann. § 76-2508. Appellant contends that the city ordinances allow the taking of its billboards without paying just compensation and therefore they are in contravention of the state law. It concludes that such contraventions violate Art. 12 § 4 of the Constitution of Arkansas: "No municipal corporation shall be authorized to pass any law contrary to the general laws of the state. . . ."

However, all areas zoned commercial or industrial are exempt from the provisions of the Arkansas Highway Beautification Act, Ark. Stat. Ann. § 76-2506; *Yarbrough vs. Arkansas State Highway Commission*, 260 Ark. 161, 539 S.W.2d 419 (1976). All of appellant's signs are located on property zoned commercial or industrial and are therefore exempt from the provisions of the act. *Accord Ackerly Communications vs. City of Seattle*, 602 P.2d 1177 (1979), *cert. denied* 449 U.S. 804 (1980; *contra Metromedia vs. City of San Diego*, 610 P.2d 407 (1980).

We affirm.

Hickman, J., concurs, still maintaining view expressed in *City of Fayetteville vs. S & H, Inc.*, 261 Ark. 148, 547 S.W.2d 94 (1977).

Adkisson, C.J., Holt and Purtle, JJ, dissent.

(Caption omitted in printing)

DISSENT

RICHARD B. ADKISSON, Chief Justice

It is my view that the amortization provisions of the sign and zone ordinances constitute a public taking of private property in violation of Ark. Const. art. 2, §22.

A four year amortization period for a sign constructed of concrete or steel seems unreasonable. The anticipated useful life at the time of construction would clearly be in excess of four years as evidenced by the fact that all of the sixty signs are from twelve to twenty-four years old.

I would also disagree with the majority in their holding that the cost of the sign, standing alone, is sufficient evidence of its value.

Further, I cannot agree with the majority's suggestion that the fact that this case has been in litigation for some years has some effect on the fair market value of the signs. Purtle, J., joins in this dissent.

(Caption omitted in printing)

DISSENT

FRANK HOLT, Associate Justice

I would reverse based upon the reasons expressed in my dissent in *City of Fayetteville vs. McIlroy Bank & Trust Co. et al*, 278 Ark. 500, 647 S.W.2d 439 (1983). Purtle, J., joins in this dissent.

(Caption omitted in printing)

AMENDED OPINION.

Opinion delivered December 19, 1983

ROBERT H. DUDLEY, Associate Justice

The last two paragraphs of the original opinion are amended as follows:

Appellant's final point is that the Arkansas Highway Beautification Act, Ark. Stat. Ann. § 76-2501, et seq., precludes the city from requiring the uncompensated removal of its billboards which are adjacent to federal aid highways. The act was adopted to provide effective control of outdoor advertising within 660 feet of federal aid highways and to conform with the Federal Highway Beautification Act of 1975, as amended, 23 U.S.C. § 131. A 1981 amendment to the Arkansas act provides that no municipality shall remove any outdoor advertising without paying just compensation. Ark. Stat. Ann. § 76-2508. Appellant contends that the city ordinances allow the taking of its billboards without paying just compensation and therefore they are in contravention of the state law. It concludes that such contraventions violate Art. 12 § 4 of the Constitution of Arkansas: "No municipal corporation shall be authorized to pass any law contrary to the general laws of the state. . . ."

However, long before the 1981 amendment to the Arkansas act became effective, the municipal ordinances had already mandated that appellant's signs be altered or removed. The amortized life of the signs had ended on January 19, 1977. Appellant would have us apply the 1981 amendment retroactively in order to give new life to its signs. Like the Supreme Court of Washington, we decline to retroactively apply such a provision. *Ackerley*

Communication vs. City of Seattle, 602 P.2d 1177 at 1186 (Wash. 1979). Without retroactive application of the act, the ordinances are not in contravention of state law.

Affirmed.

No. 22176

THE CHANCERY COURT OF
WASHINGTON COUNTY, ARKANSAS
FIRST DIVISION

DONREY COMMUNICATIONS CO., INC.,
(Formerly American Television Co., Inc.,
d/b/a Donrey Outdoor Advertising Co.),
and TRI-STATE REALTY COMPANY

Plaintiffs

vs.

CITY OF FAYETTEVILLE, ARKANSAS

Defendant

LAWRENCE HESTER,
ROBERTS ENTERPRISES, INC.,
SIGNA-LUME SIGN COMPANY, INC.,
WHITECO INDUSTRIES, INC.,
NATIONAL ADVERTISING CO.

Intervenors

MEMORANDUM OPINION

This is an action for declaratory judgment whereby plaintiffs and intervenors (hereafter, generally, "plaintiffs") ask that defendant City's Ordinances No. 1747 and 1893, as amended, be adjudged unconstitutional as applied to them.

Ordinances 1747 (adopted June 29, 1970) and 1893 (adopted December 19, 1972) constitute, in combination, a comprehensive zoning scheme for the City. No. 1893 is a substantial re-writing and amendment of No. 1747. No. 1893 was later amended by Ordinances 2109, 2126 and 21401.

With respect to this case, the ordinances forbid outdoor billboard advertising in all parts of the city except those areas zoned C-2 commercial, and restrict the size of billboards and establish setback requirements. Existing billboards are required to be moved from now forbidden zones, and those within the permitted zone that exceed the limits specified must either be altered to conform or removed; all by January 19, 1977, thus providing a 4-year "amortization" period for plaintiffs to bring themselves into conformity.

It is the threatened enforcement of the ordinances by imposition of money fines for violations, together with averred substantial detrimental effects upon their economic interests that plaintiffs seek to prevent by this action, invoking various provisions of the Arkansas and United States Constitutions as bases therefor.

The litigious course of this case has been both protracted and sporadic and has thus seen a correspondingly long time in coming to decision. A chronology is here inserted, not for substantive worth, but to illustrate the complexity of the case (from the mass of pleadings, and voluminous briefs) as well as the ingenuity and assiduity of counsel:

—Complaint, filed July 2, 1971.
—1st amendment to complaint, September 7, 1971.

—2nd amendment to complaint, November 12, 1971.

—At this juncture, the case went off on demurrer and experienced a round-trip to and from the Supreme Court, with remand to the trial court. (See American TV et al vs. City of Fayetteville, 253 Ark. 760, January 15, 1973).

—(A hiatus ensued hereafter until):

—Answer, June 4, 1975, to complaint and 1st and 2nd amendments.
—Amendment to answer, October 31, 1975.

—(A second hiatus ensued until):
—2nd amendment to complaint, January 14, 1977 (although not so styled, this pleading appears to be, in substance, an amended and substituted complaint).
—Answer, January 14, 1977, to 2nd amendment to complaint.
—Motion (July 15, 1977) and order (July 18, 1977) to amend 2nd amendment to complaint of January 14, 1977, to correct typos therein.
—Amendment to answer, and counterclaim; counterclaim to interventions of Hester, Roberts and Signa-Lume, October 13, 1977.
—Defendant's motion for summary judgment and brief, October 13, 1977.

(A third hiatus ensued until):

—Plaintiffs' response and brief, November 1, 1978.
—Stipulation of Facts, November 3, 1978.

(A fourth hiatus ensued until):

—Defendant City's reply brief, December 19, 1980.
—Stipulated agreement between U.S. Secretary of Transportation and Arkansas Highway Department, December 19, 1972.
—Plaintiffs' amended and substituted response to City's motion, May 20, 1981.

—Plaintiffs' cross-motion for summary judgment and brief, June 2, 1981.
—Defendant's response and brief, June 26, 1981.
—Defendant's supplemental brief supporting motion for summary judgment, August 6, 1981.
—Plaintiffs' supplemental brief supporting motion for summary judgment, August 14, 1981.
—Defendant's supplemental reply brief, August 21, 1981.

(A fifth and final hiatus ensued until the date of this memorandum for which the court assumes full responsibility, suggesting only that the final submission of the case, more than a year ago, became lost in the ruck of other and supervening work to which the Court's daily attention has been required).

It appears that plaintiffs, in the aggregate, own or lease and maintain numerous free-standing off-site, that is, not on property of the business or services advertised, billboard structures throughout the City. In some instances the plot of ground on which the billboard stands is leased by the owner of the billboard. In most instances, both the ground and the billboard are owned by the same person. Donrey maintains by far the greatest number of billboards, some 80 or more; and Tri-State owns and leases the greatest number of ground plots on which billboards stand. Intervenors, among them, own and maintain relatively few billboards and lease the plots for their billboards.

For many years, plaintiffs have maintained advertising billboards in two conventional sizes of display space: "Poster panels" 12 x 25 feet, 300 square feet; and "painted bulletins", 14 x 48 feet, 672 square feet. The strictures of the challenged ordinances limit such off-site, free-standing billboards to a display surface of 75 square feet.

It is the gravamen of the complaint that these strictures effectively destroy plaintiffs' business and business properties in that: (1) Most of their billboards will have to be removed or reduced in size to an impracticable degree; (2) the small size and irregular shapes of the ground plots on which the billboards stand cannot be used for any other purpose, hence, their economic usefulness is totally lost.

Plaintiffs' attack upon the ordinance is based primarily on Arkansas and U.S. Constitutional grounds, that enforcement of the ordinances deprives them of their property without due process of law; that plaintiffs' U.S. Constitution 1st Amendment rights of freedom of speech and 14th Amendment rights of equal protection of the law are invaded. These assertions stem from the fact that other permitted signs and billboard type advertising structures and devices may be permissibly located where plaintiffs' cannot, and may carry various kinds of messages that plaintiffs' cannot. It is also strongly asserted that the application of the ordinances to plaintiffs offends against Arkansas Constitution, Art. 2, Sec. 22, as a taking of private property without just compensation.

The City's principal response, and the basis for its motion for summary judgment, is that the ordinances are a proper exercise of the city's police power in promotion of the public health, safety, morals and welfare. Being such, there is no "back-door" eminent domain requiring compensation; and even if substantial economic loss is to be suffered as a result it is not compensable.

In the language of our Supreme Court, this case, as in so many of similar nature, "brings into sharp focus the conflict between private property rights and the right of

municipal government to control the owner's use of property" (*Blundell vs. City of West Helena*, 258 Ark. 123, 522 S.W.2d 661) and "arises from the constant friction between two inherent rights — the right of private property and the police power, both of which we consider to exist without constitutions grant", (Fogleman, J., concur in part, dissent in part, *City of Fayetteville vs. S & H, Inc.*, 261 Ark. 148 at 157, 547 S.W.2d 94.)

The spate of supplemental briefs filed by counsel in August, 1981 after the close of normal brief submission time, was occasioned by the decision of the U.S. Supreme Court in *Metromedia, Inc. vs. City of San Diego*, 269, Ed. (2d) 800 (July 2, 1981). That case, on facts strikingly similar to the instant case, primarily involved questions of Federal 1st Amendment rights inhering in private owners of billboard displays, which displays had been sharply limited as to location and content by municipal ordinance.

Both counsel and the court, in the instant case, deliberately allowed this case to "lay by" until time for possible re-hearing by the Federal Supreme Court had elapsed.

With these latest briefs in hand, the substantive dimensions reduced essentially to two: (1) Whether the Fayetteville ordinances are an unconstitutional infringement on plaintiff's 1st Amendment rights and (2) whether they are an infringement of plaintiffs' property rights under the 14th amendment equal protection clause and Arkansas Constitution Art. 2, Sec. 22.

The *Metromedia* case produced five separate opinions: A 4-judge opinion, a 2-judge opinion, concurring in results; 3 separate dissenting opinions. It is safe to say that these

opinions, among them, cited virtually every case decided in the last 50 years, bearing on the point involved. Many, if not all, of these cases are relied upon by counsel here.

For purposes of this case, the primary point in *Metromedia* requiring attention is the rationale of the plurality opinions striking down the San Diego ordinance because it discriminated between allowed and forbidden commercial and non-commercial messages, in violation of 1st Amendment free speech rights. The opinion says,

> "Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones."

In this case, it is shown that, following the U.S. Court's decision in *Metromedia,* defendant's Board of Directors, on August 18, 1981, amended Ordinance 1893 to remove any prohibitions against display of noncommercial messages on any sign, whether on-site, off-site or outdoor (billboard) advertising. (See Ordinances 2752 and 2753 — defendant's supplemental reply brief and exhibit, filed August 21, 1981). Thus, the impediment seen to the San Diego ordinance in *Metromedia* does not obtain as to defendant's Ordinance 1893, as amended, and the 1st Amendment flaw does not obtain. This court concludes that the challenged ordinances are not violative of plaintiffs' 1st Amendment rights of free speech.

With respect to the question of deprivation of property rights, in the context of equal protection of the laws, that is, the limitations imposed upon plaintiffs' off-site billboards, as distinguished from other property owners' on-site signs, there appears to be little question.

In *Metromedia*, the appellant sign owners (occupying the position of plaintiffs here) argued that the distinction drawn between permitted on-site signs and prohibited off-site signs was invidious and artificial. The plurality opinion, acknowledging the logical force of the argument said that:

> "Despite the apparent incongruity, this argument has been rejected, at least implicitly, in all of the cases sustaining the distinction between off-site and on-site commercial advertising. We agree with those cases and with our own decisions in *Suffolk Outdoor Adv. vs. Hulse*, 439 U.S. 808 (1978); *Markham vs. Adv. Co. vs. Washington*, 393 U.S. 316 (1969); *Newman Signs Inc. vs. Hjelle*, 440 U.S. 901 (1979). . . . Thus, off-site commercial billboards may be prohibited while on-site billboards are permitted."

This proposition is recognized by our own Supreme Court in a case involving the same ordinance, in earlier form, here involved. In *Fayetteville Bd. of Adjustment vs. Osage Oil*, 258 Ark. 91, 522 S.W.2d 836 (1975), the court said:

> "The basic power of a municipality to regulate the size and location of billboards and other commercial signs has been sustained in so many jurisdictions that it would be a waste of time and effort to cite the cases. Such regulations have been upheld upon many grounds, including the promotion of traffic safety, the control of potentially hazardous structures, and the fundamental considerations of city planning and city beautification that underlie the zoning concept itself. We have sustained simple regulations affecting signs. Seiz vs. City of Hot Springs, 194 Ark. 544, 108 S.W.2d 897 (1937); Berkau vs. City of Little Rock, 174 Ark. 1145, 298 S.W. 514 (1927).
>
> Moreover, the particular distinction now before us, between on-site and off-site advertising signs, has almost unvariably been held to be constitutional."

I conclude that the questioned ordinance does not violate plaintiffs' property rights contrary to either the U.S. or State Constitutions guaranteeing equal protection of the laws.

Plaintiffs' most vigorous argument is that their property rights are infringed by defendant's ordinance, contrary to due process of law as protected by Federal and State Constitutions; and in particular that the ordinance offends against Art. 2, Sec. 22 of the Arkansas Constitution, in that it takes away their properties — billboards and the ground upon which they are erected — without just compensation.

Art. 2, Sec. 22 is one of the noblest and most fundamental statements of a free peoples' rights contained in our organic law. It says:

> "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use without just compensation."

Plaintiffs say that their business and business properties will be completely destroyed by the challenged ordinance. Persuasive argument and factual data are advanced to this end. Stripped to essentials, it is this: Plaintiffs' business has evolved to comprehend an integrated system of outdoor advertising displays—billboards — of conventional sizes, the 12 x 25 foot poster panel and the 14 x 48 foot painted bulletin: These are located at sites designed to catch the eye, if not the attention, of the greatest number of passing motorists, over as large an area as experience shows will produce results, that is, transmitting the advertising message to the general public.

Plaintiffs says that they are now required physically to remove these signs, abandon the small plots of ground holding the signs, and thus lose the effective and profitable use of the physical properties, as well as the intangible availability and use of the many and dispersed signs and locations—the very heart of their business.

But, methinks the plaintiffs do protest too much. The undisputed fact is that their business will not be destroyed. The physical locations are restricted; the square footage of displays is reduced. But the erection and maintenance of signs is not, per se, forbidden, nor are the numbers thereof necessarily reduced. It i a reductio ad absurdum to say that their business will be completely destroyed.

The real question is whether the defendant's restricitons are a proper exercise of the municipal police power. The principal underlying existence and exercise of the police power is that the exercise of such by legislating to prohibit or prevent that which is inimical to the public health, safety and welfare is an inherent power of sovereignty, which is necessary for the protection of the citizens of the state, and when delegated by the state to its municipal corporations, is tested on judicial review in this state to determine whether constitutional limits have been transcended. *Geurin vs. City of Little Rock,* 203 Ark. 103; *City of Helena vs. Dwyer,* 64 Ark. 424; *Williams vs. State,* 85 Ark. 464; *Replogle vs. City of Little Rock,* 166 Ark. 617; *Bennett vs. City of Hope,* 204 Ark. 147.

Judicial review tests legislation in the assumed exercise of the police power in the interest of the health, safety and welfare of the public, not to review the exercise of legislative descretion as to the necessity for the exercising

of the power in a given case, but to determine whether the legislation bears a real or substantial relationship to the protection of public health, safety and welfare in order that personal rights and property rights not be subjected to arbitrary or oppressive, rather than reasonable invasion. *Union Carbide Carbon Corp. vs. White River District,* 224 Ark. 558; *City of Helena vs. Dwyer,* supra; *Williams vs. State,* supra; *Missouri & N.A.R. Co. vs. State,* 82 Ark. 1; *Dreyfuss vs. Boone,* 88 Ark. 353; *Pierce Oil Co. vs. City of Hope,* 127 Ark. 38; *Noble vs. Davis,* 204 Ark. 156.

If, therefore, the questioned ordinance bears a reasonable relation to the promotion of public health, safety and welfare it is immune from constitutional attack, even though property values be reduced or, as in this case, property of value must be removed and, in the business sense, "destroyed."

Ordinance 1893 declares that,

"The construction, repair, alteration, location and maintenance of signs should be controlled within the city limits of the City of Fayetteville, Arkansas, in order to protect the public investment in the streets and highways, to promote the safety and recreational value of public travel and to preserve natural beauty, and

WHEREAS, the purpose of this Ordinance is to promote the reasonable, orderly, and effective display of signs while remaining consistent with the city policy to protect the public investment in the streets and highways, to promote the safety and recreational value of public travel and to preserve natural beauty, and

WHEREAS, the Board of Directors has made the following findings of fact:

> (1) That the uncontrolled proliferation of signs is hazardous to the users of streets and highways within the limits of the City of Fayetteville, Arkansas."

Plaintiffs argue and submit factual data by affidavit, that there is no recorded instance in defendant's police records where a traffic casualty was caused by interfering or distracting effect on motorists or pedestrians of plaintiff's billboards; and reason from this that they do not constiute and will not be traffic hazards; hence, defendant's declarations of promotion of public safety are a sham; that is, the stated reason for the ordinance, to promote public safety, is not demonstrable nor sustainable.

The same argument was advanced and rejected in *Moore vs. Ward,* 377 S.W.2d 881 (Ky. 1964). There, the Kentucky court, after noting that even if appellants could produce substantial evidence that billboard signs do not adversely affect traffic safety held that

> ". . . our common knowledge suggests that the question involves so many intangible factors as to make debatable the issue of what the facts establish. Where this is so, it is not within the province of the court to hold a statute invalid by reaching a conclusion contrary to that of the legislature. Radice vs. People of the State of New York, 264 U.S. 292."

Likewise, in the *Metromedia* case the same argument was made, that the San Diego ordinance was not based on any demonstrated connection between billboards and traffic safety; hence, it did not directly advance governmental interests in traffic safety and the appearance of the city. The U.S. Supreme Court's plurality opinion, noting that the California Supreme Court (from whence came the appeal) agreed with many other courts that a legislative

judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside, said:

> "We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable. As we said in a different context, Railway Express Agency, Inc. vs. People of New York, 336 U.S. 106, 109 (1949):
>
> > 'We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.' "

The fact that there have been no recorded traffic accidents attributable to hazards offered by billboards is neither conclusive nor very persuasive that they do not constitute hazards. Their very purpose is to draw the eye to them, and thus, even fractionally, to divert a driver's attention from operation of his vehicle. On reason and authority, I cannot find that the regulation of billboards is not reasonably related to the public safety and welfare.

Nor does the statement of purposes in the ordinance "to preserve natural beauty" and the preservation of scenic resources, combined with consideration of public safety, weaken the legislative justification for regulating billboards. *Herring vs. Stannus,* 169 Ark. 244. The fact that aesthetic considerations were a significant factor in the exercise of the police power should not invalidate an ordinance for an otherwise legitimate police power objective. The question of unreasonableness or arbitrariness is

plainly one of fact. In the absence of anything on the face of the ordinance or in the evidence to show that it was arbitrary or unreasonable, the courts must presume it to be valid. *Bd. of Adjustment vs. Osage Oil and Transportation, Inc.*, 558 Ark. 9; *City of Helena vs. Miller*, 88 Ark. 263; *Berkau vs. City of Little Rock*, 174 Ark. 1145.

As above noted, in the *Osage Oil* case, the power of defendant city to regulate the size and location of billboards is not subject to question. Hence, it is unnecessary to decide whether they may be prohibited altogther, although *Osage* suggests this may be done; and there is language in *Metromedia* suggesting the same ultimate power. Here, however, we are not concerned with this ultimate power, but only with the power reasonably to regulate for the public safety, health and welfare.

Concluding, as the court does, that Ordinance 1893, as amended, is a proper exercise of defendant's police power, a question remains whether the economic loss averredly to be sustained by plaintiffs by requisite compliance with the ordinance is an invalidating factor. The court concludes that it is not. The ordinance seeks to embrace and apply the "amortization" theory to plaintiffs; this being that, as the undisputed facts show, plaintiffs' average cost in erecting its signs is in the range of $500-$1000, and all but one erected over a period of eleven years before June, 1970. The one sign was put up in December, 1971. The theory of amortization is that a reasonable period of nonconforming use after prohibition allows the owner to amortize his investment.

It is unnecessary to pass upon the validity, per se, of such amortization scheme; such is still an unresolved

question in Arkansas, although doubtless our high court will be obliged to decide the matter before too long. The reason is that, given a proper exercise of police power, the cost to plaintiffs in removing or altering their billboards (as well as loss to lessors of this use of land where the signs are erected) is neither compensable nor invalidly confiscatory. Such property owners are deemed sufficiently compensated by sharing in the general benefits stemming from exercise of the police power. *City of Little Rock vs. Sun Bldg. & Dev. Co.*, 199 Ark. 333; *City of West Helena vs. Bockman*, 221 Ark. 667.

Plaintiffs argue with considerable force that the Arkansas Highway Beautification Act (Ark. Stats. Secs. 75-2501 et seq.) prohibits by pre-emption defendant's power to regulate size and location of billboards and from requiring their uncompensated removal from points adjacent to Federal-aid interstate or primary highways. U.S. Highway 71, traversing Fayetteville North-South, is a federal-aid highway, and many of plaintiffs' signs are located adjacent thereto.

Stipulated Agreement No. 1 in the case record is the agreement, dated January 24, 1972, between the U.S. Secretary of Transportation and the Arkansas Highway Department, relative to control of outdoor advertising in areas adjacent to federal interstate and defense highways and federal-aid primary highway systems. The agreement was made to permit Arkansas to remain eligible to receive federal-aid highway funds under the Federal Highway Beautification Act of 1965.

By its terms, the agreement does not apply to "outdoor advertising signs legally erected and maintained, in zoned and unzoned commercial and industrial areas established

by this agreement, on FAL and FAI Highways prior to the date of enactment of this agreement." (p. 4-5 of stipulated exhibit 1).

The Arkansas Highway Beautification Act does not, in its terms, pre-empt the area of control of outdoor advertising from municipalities and there is no fair intendment expressed to this effect. The ordinance here in question does not purport to permit outdoor advertising signs that are forbidden under the Beautification Act, and thus presents no conflict with state law.

The Federal Beautification Act was amended in 1978 to require, so plaintiffs argue, payment of just compensation for forced removal of signs adjacent to federal-aid highways. The court finds no Arkansas case law on this point. The Washington Supreme Court, however, has passed on the precise point, in *Ackerly Communications vs. City of Seattle,* 602 p. 2d 1177 (1979). That court said:

> ". . . since signs within commercial and industrial zones which are not governed by an agreement between the State and the Department of Transportation, are not regulated by, and are wholly outside the scope of, the federal statute, the only reasonable interpretation of the statutory language is that it does not require compensation for such signs . . . The legislative history of this amendment, a part of the Surface Transportation Act of 1978, makes it clear that it is intended to clarify existing law and, contrary to respondent Ackerly's contention, requires compensation only for signs which do not meet the "effective control" requirements of the Federal Act . . . We conclude, then, that the Federal Highway Beautification Act does not require compensation for those outdoor advertising signs not within the scope of its provisions for effective control. Since respondents' signs are indisputably in commercial and industrial areas of the city,

which are not within the effective control provisions of the Act, and having been erected prior to 1971, are not covered by the agreement between the State of Washington and the Department of Transportation, it is clear that none of the provisions of the federal act, including the compensation requirement, apply to respondents' signs." 602 P. 2d 1184-1185.

It appears, therefore, that if plaintiffs' signs are not controlled by either the Agreement (stipulated exhibit 1) or the Federal Act, no compensation is required thereby. The record shows that all of plaintiffs' signs were put up before January 24, 1972; all are in commercial and industrial zones of the city, and the agreement does not apply to such signs that were legally erected in these areas. *Ackerly* is virtually on all fours with the present case. In my judgment therefore, there is neither pre-emption of the City's power to regulate plaintiffs' signs, nor a requirement that removal thereof be compensated, by virtue of the Federal or State Highway Beautification Acts, nor by the Arkansas Home Rule Act (Ark. Stats. Secs. 19-1042 et seq.)

In all essential respects, the court finds that there is no genuine issue of material fact in this case, and that defendant is entitled to judgment as a matter of law on its motion therefor, holding Ordinance 1893, as amended, as constitutional; and on its counterclaims. By the same token, plaintiffs' motions for summary judgment require to be overruled.

Let decree enter accordingly.

NOVEMBER 3, 1982.

/s/ THOMAS F. BUTT,
Chancellor

FEDERAL HIGHWAY BEAUTIFICATION ACT

23 U.S.C. § 131. Control of Outdoor Advertising

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State

shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State,

subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices

referred to in clauses (2) and (3) of subsection (c) of this section.

(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. The Secretary may also, in consultation with the States, provide within the rights-of-way of the primary system for areas in which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable. The Federal share of the cost of establishing such an information center or travel information system shall be that which is provided in section 120 for a highway project on that Federal-aid system to be served by such center or system.

(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in

the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement: Provided, That permission by a State to erect and maintain information displays which may be changed at reasonable intervals by electronic process or remote control and which provide public service information or advertise activities conducted on the property on which they are located shall not be considered a breach of such agreement or the control required thereunder. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

(k) Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the

State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to ex-

ceed $20,000,000 for the fiscal year ending June 30, 1967, not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,500,000 for the fiscal year ending June 3, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(o) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are on existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays, and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removel would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974, which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed,

the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q) (1) During the implementation of State laws enacted to comply with this section, the Secretary shall encourage and assist the States to develop sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing standards for directional signs authorized under subsections 131(c) (1) and 131(f) to develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for those purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilties in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

ORDINANCE NO. 1747

ARTICLE 5. ZONING DISTRICT PROVISIONS

For the purposes of this ordinance, the City of Fayetteville is divided into the following districts:

District A-1. Agricultural

District R-1. Low Density Residential

District R-2. Medium Density Residential

District R-3. High Density Residential

District C-1. Neighborhood Commercial

District C-2. Thoroughfare Commercial

District C-3. Central Business Commercial

District I-1. Heavy Commercial and Light Industrial

District I-2. General Industrial

District R-O. Residential—Office

District P-1. Institutional

District F-1. Flood Zone

(I) DISTRICT A-1. AGRICULTURAL

(A) *Purposes*

The regulations of the Agriculture District are designed to:

(a) protect agricultural land until an orderly transition to urban development has been accomplished

(b) prevent wasteful scattering of development in rural areas

(c) obtain economy of public funds in the providing of public improvements and services for orderly growth

(d) conserve the tax base

(e) prevent unsightly development

(f) increase scenic attractiveness

(g) conserve open space

(B) *Uses Permitted*

Unit 1—City wide uses by right

Unit 3—Public protection and utility facilities

Unit 6—Agriculture

Unit 7—Animal husbandry

Unit 8—Single family and two family dwellings

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 4—Cultural and recreational facilities

Unit 20—Commercial recreation: large sites

(D) *Bulk and Area Regulations*

Lot Width—200 ft. minimum

Lot Area:

Residential—2 acre minimum
Non-Residential—2 acre minimum

Lot Area per
Dwelling Unit—2 acre minimum

(E) *Yard Requirements* (Feet)

Front Yard		Side Yard		Rear Yard	
Interior			Corner Lot		
One		Other	Interior	Exterior	
35	20	20	20	35	35

(F) *Height Requirements*

There shall be no maximum height limits in the A-1 District, provided, however, that any building which exceeds the height of 15 feet shall be set back from any boundary line of any Residential District a distance of 1.0 feet for each foot of height in excess of 15 feet. Such setbacks shall be measured from the required yard lines.

(II) DISTRICT R-1. LOW DENSITY RESIDENTIAL DISTRICT

(A) *Purposes*

The low density residential district of four families per acre or less in the case of single family homes and seven families per acre or less in the case of two family dwellings is designed to permit and encourage the development of low density detached dwellings in suitable environments, as well as to protect existing development of these types.

(B) *Uses Permitted*

Unit 1—City-wide uses by right

Unit 26—Single family dwelling

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 3—Public protection and utility facilities

Unit 4—Cultural and recreational facilities

Unit 8—Single family and two family dwellings

(D) *Bulk and Area Regulations*

	Single Family	*Two Family*
Lot Width Minimum	70 ft.	80 ft.
Lot Area Minimum	8000 sq. ft.	12,000 sq. ft.
Land Area per Dwelling Unit	8000 sq. ft.	6,000 sq. ft.

(E) *Yards Requirements* (Feet)

Front Yard	Side Yard			Rear Yard
Interior		Corner Lot		
One	Other	Interior	Exterior	
25	8	8	25	20

(F) *Building Area.* On any lot the area occupied by all buildings shall not exceed forty (40) per cent of the total area of such lot. (Ord. No. 1880, § 2, 8-15-72)

(III) DISTRICT R-2. MEDIUM DENSITY RESIDENTIAL

(A) *Purposes*

The medium density residential district with four to twenty-four families per acre is designed to permit and encourage the developing of a variety of dwelling types in suitable environments in a variety of densities.

(B) *Uses Permitted*

Unit 1—City-wide uses by right

Unit 8—Single-family dwellings

Unit 9—Multifamily dwellings—medium density

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 3—Public protection and utility facilities

Unit 4—Cultural and recreational facilities

Unit 11—Mobile home park

Unit 25—Professional offices

(D) *Bulk and Area Regulations*

Lot width minimum:

Mobile home park	100 feet
Lot within a mobile home park	50 feet
Townhouse	24 feet
One family	60 feet
Two family	60 feet
Three or more	90 feet
Professional offices	100 feet

Lot area minimum:

Mobile home park	3 acres
Lot within a mobile home park	4,200 square feet
Townhouse or row house	
Development	10,000 square feet
Individual lot	2,500 square feet
Single family	6,000 square feet
Two family	7,000 square feet
Three or more	9,000 square feet
Fraternity or sorority	2 acres
Professional offices	1 acre

Land area per dwelling unit:

Mobile home	3,000 square feet
Townhouse	2,500 square feet
Apartments	
Two or more bedrooms	2,000 square feet
One bedroom	1,700 square feet

No bedroom	1,700 square feet
Fraternity or sorority	1,000 square feet per resident

(E) *Yard Requirements* (Feet)

Front Yard	Side Yard		Rear Yard	
Interior	Corner Lot			
		Interior	Exterior	
25	8	8	25	25

Side yards may be waived to permit common walls between townhouses.

(F) *Height Regulations*

Any building that exceeds 20 feet in height shall be set back from the building line one (1) foot for each foot of height in excess of 10 feet. (Ord. No. 2320, §§ 1, 2, 4-5-77)

(IV) DISTRICT R-3. HIGH DENSITY RESIDENTIAL

(A) *Purposes*

The high density residential district with 16 to 40 families per acre is designed to protect existing high density multifamily development and to encourage additional development of this type where it is desirable.

(B) *Uses Permitted*

Unit 1—City-wide uses by right

Unit 8—Single-family and two family dwellings

Unit 9—Multifamily dwellings—medium density

Unit 10—Multifamily dwellings—high density

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 3—Public protection and utility facilities

Unit 4—Cultural and recreational facilities

Unit 11—Mobile home park

Unit 25—Professional offices

(D) *Bulk and Area Regulations*

Lot width minimum:

Mobile home park	100 feet
Lot within a mobile home park	50 feet
Townhouse	24 feet
One family	60 feet
Two family	60 feet
Three or more	90 feet
Professional offices	100 feet

Lot area minimum:

Mobile home park	3 acres
Lot within a mobile home park	4,200 square feet
Townhouse or row house Development	10,000 square feet
Individual lot	2,500 square feet
One family	6,000 square feet
Two family	6,500 square fee
Three or more	8,000 square feet
Fraternity or sorority	1 acre
Professional offices	1 acre

Land area per dwelling unit:

Mobile home	3,000 square feet
Townhouse or row house	2,500 square feet

Apartments

Two or more bedrooms	1,200 square feet
One bedroom	1,000 square feet
No bedroom	1,000 square feet
Fraternity or sorority	500 square feet per resident

(E) *Yard Requirements* (Feet)

Front Yard	Side Yard		Rear Yard
	Interior	Corner Lot	
		Interior Exterior	
25	8	8 25	20

Side yards may be waived to permit common walls between townhouses.

(F) *Height Regulations*

Any building that exceeds 20 feet in height shall be set back from the building line one (1) foot for each foot of height in excess of 10 feet. (Ord. No. 2320, §§ 3, 4, 4-5-77)

(V) DISTRICT C-1. NEIGHBORHOOD COMMERCIAL

(A) *Purposes*

The neighborhood commercial district is designed primarily to provide convenience goods and personal services for persons living in the surrounding residential areas.

(B) *Uses Permitted*

Unit 1—City-wide uses by right

Unit 12—Offices, studios and related services

Unit 13—Eating places

Unit 15—Neighborhood shopping

Unit 18—Gasoline service stations and Drive-in Restaurants

Unit 25—Professional offices

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 3—Public protection and utility facilities

Unit 4—Cultural and recreational facilities

(D) *Bulk and Area Regulations*

Setback lines shall meet the following minimum requirements:

From street row	50 feet
From side property line	None
From side property line when contiguous to a residential district	10 feet
From back property line	20 feet

(E) *Building Area*

On any lot the area occupied by all buildings shall not exceed 40 per cent of the total area of such lot.

(F) *Height Regulations*

There shall be no maximum height limits in C-1 District, provided, however, that any building which exceeds the height of 10 feet shall be set back from any boundary line of any Residential District a distance of one foot for each foot of height in excess of 10 feet. (Ord. No. 2603, § 1, 2-19-80)

(VI) DISTRICT C-2. THOROUGHFARE COMMERCIAL

(A) *Purposes*

The thoroughfare commercial district is designed especially to encourage the functional grouping of these commercial enterprises catering primarily to highway travelers.

(B) *Uses Permitted*

Unit 1—City-wide uses by right

Unit 4—Cultural and recreational facilities

Unit 12—Offices, Studios and Related Services

Unit 13—Eating places

Unit 14—Hotel, Motel and Amusement Facilities

Unit 15—Neighborhood shopping goods

Unit 16—Shopping goods

Unit 17—Trades and Services

Unit 18—Gasoline service stations and Drive-in restaurants

Unit 19—Commercial recreation

Unit 20—Commercial recreation: Large sites

Unit 24—Outdoor advertising

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 3—Public protection and utility facilities

Unit 21—Warehousing and wholesale

Unit 28—Center for collecting recyclable materials

(Ord. No. 1833, § 1, 11-1-71; Ord. No. 2351, § 2, 6-21-77)

(D) *Bulk and Area Regulations*

Setback lines shall meet the following minimum requirements:

From street row	50 feet
From side property line	None
From side property line when contiguous to a residential district	15 feet
From back property line	20 feet

(E) *Building Area*

On any lot the area occupied by all buildings shall not exceed sixty (60) per cent of the total area of such lot.

(F) *Height Regulations*

In District C-2 any building which exceeds the height of 20 feet shall be set back from any boundary line of any Residential District a distance of one foot for each foot of height in excess of 20 feet.

No building shall exceed six (6) stories or 75 feet in height. (Ord. No. 2603, § 2, 2-19-80)

(VII) DISTRICT C-3. CENTRAL COMMERCIAL

(A) *Purposes*

The central commercial district is designed to accommodate the commercial and related uses commonly found in the central business district or regional shopping centers which provide a wide range of retail and personal service uses.

(B) *Uses Permitted*

Unit 1—City-wide uses by right

Unit 4—Cultural and recreational facilities

Unit 5—Government facilities

Unit 9—Multifamily dwelling—low density

Unit 10—Multifamily—high density

Unit 12—Offices, studios and related services

Unit 13—Eating places

Unit 14—Hotel, motel and amusement facilities

Unit 15—Neighborhood shopping goods

Unit 16—Shopping goods

Unit 18—Gas service stations and drive-in restaurants

Unit 19—Commercial recreation

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 3—Public protection and utility facilities

Unit 17—Trades and services

Unit 28—Center for collecting recyclable materials

(Ord. No. 2351, § 3, 6-21-77)

(D) *Bulk and Area Regulations*

Setback lines shall meet the following minimum requirements:

	Central Business District	*Shopping Center*
From street row	5 feet	25 feet

From street row if parking is allowed between the row and the building	50 feet	50 feet
From side property line	none	none
From side property line when contiguous to a residential district	10 feet	25 feet
From center line of a public alley	10 feet	10 feet

(Ord. No. 2603, § 3, 2-19-80)

(VII(a)) DISTRICT C-4. DOWNTOWN

(A) *Purposes*

The downtown district is designed to accommodate the commercial, office, governmental and related uses commonly found in the central downtown area which provide a wide range of retail, financial, professional office, and governmental office uses.

(B) *Uses Permitted*

Unit 1—City-wide uses by right

Unit 4—Cultural and recreational facilities

Unit 5—Government facilities

Unit 12—Offices, studios and related services

Unit 13—Eating places

Unit 14—Hotel, motel and amusement facilities

Unit 15—Neighborhood shopping goods

Unit 16—Shopping goods

Unit 19—Commercial recreation

Unit 25—Professional offices

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 3—Public protection and utility facilities

Unit 10—Multifamily dwelling—high density

Unit 17—Trades and services

Unit 18—Gas service stations and drive-in restaurants

Unit 28—Center for collecting recyclable materials

(Ord. No. 2351, § 4, 6-21-77)

(D) *Bulk and Area Regulations*

Setback lines shall meet the following minimum requirements:

From street row	5 feet
From street row if a sidewalk is in existence or to be provided	none
From side property line	none
From side property line when contiguous to a residential district	10 feet
From back property line without easement or alley	none
From center line of a easement or alley	8 feet

(E) *Off-street Parking*

Notwithstanding any other provisions in this ordinance [appendix], off-street parking requirements stated in the use units provisions of Article 6 may be waived in whole or in part on appeal to the Planning Commission for any property in the

C-4 District, upon the following standards and conditions:

For each required parking space waived, the property owner or developer may:

(1) Dedicate to the city an equivalent amount of property elsewhere in the C-4 District or within one thousand (1,000) feet of the property to be developed; provided, however, that the Planning Commission finds that the proposed dedication is suitable for off-street parking for the general public; or

(2) Provide off-street parking facilities within one thousand (1,000) feet, measured by the shortest walking distance from property line to property line. (Ord. No. 2362, § 1, 8-2-77) (Ord. No. 2148, § 1, 10-7-75)

(VIII) DISTRICT I-1. HEAVY COMMERCIAL AND LIGHT INDUSTRIAL

(A) *Purposes*

The heavy commercial district is designed primarily to accommodate certain commercial and light industrial uses which are compatible with one another but are inappropriate in other commercial or industrial districts. The light industrial district is designed to group together a wide range of industrial uses, which do not produce objectionable environmental influences in their operation and appearance. The regulations of this district are intended to provide a degree of compatibility between uses permitted in this district and those in nearby residential districts.

(B) *Uses permitted*

Unit 1—City-wide uses by right

Unit 3—Public protection and utility facilities

Unit 4—Cultural and recreational facilities

Unit 6—Agriculture

Unit 12—Offices, studios and related services

Unit 13—Eating places

Unit 17—Trades and services

Unit 18—Gas service stations and drive-in restaurants

Unit 21—Warehousing and wholesale

Unit 22—Manufacturing

Unit 25—Professional offices

Unit 27—Wholesale bulk petroleum storage facilities with underground storage tanks

(Ord. No. 2098, § 1, 4-15-75; Ord. No. 2140, § 1, 8-19-75; Ord. No. 2298, § 1, 12-21-76; Ord. No. 2430, § 1, 3-21-78)

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 19—Commercial recreation

Unit 20—Commercial recreation—Large sites

Unit 28—Center for collecting recyclable materials

(Ord. No. 2298, § 2, 12-21-76; Ord. No. 2351, § 5, 6-21-77)

(D) *Bulk and Area Regulations*

Setback lines shall meet the following minimum requirements:

From street R-O-W (when adjoining A or R districts) _____ 50 feet

From street R-O-W (when adjoining C, I, F or P districts)	25 feet
Side (when adjoining A or R districts)	50 feet
Side (when adjoining C, I, F or P districts)	10 feet
Rear (when adjoining A or R districts)	25 feet
Rear (when adjoining C, I, F or P districts)	10 feet

(Ord. No. 2516, § 1, 4-3-79)

(E) *Reserved.* (Ord. No. 2516, § 2, 4-3-79)

(F) *Height Regulations*

There shall be no maximum height limits in I-1 District, provided, however, that any building which exceeds the height of 25 feet shall be set back from any boundary line of any Residential District a distance of one foot for each foot of height in excess of 25 feet.

(IX) DISTRICT I-2. GENERAL INDUSTRIAL

(A) *Purposes*

The general industrial district is designed to provide areas for manufacturing and industrial activities which may give rise to substantial environmental nuisances, which are objectionable to residential and business use.

(B) *Uses Permitted*

Unit 1—City-wide uses by right

Unit 3—Public protection and utility facilities

Unit 6—Agriculture

Unit 7—Animal husbandry

Unit 12—Offices, studios and related services

Unit 18—Gas service stations and drive-in restaurants

Unit 20—Commercial recreation: large sites

Unit 21—Warehousing and wholesale

Unit 22—Manufacturing

Unit 23—Heavy industrial

Unit 28—Center for collecting recyclable materials

(Ord. No. 2351, § 6, 6-21-77)

(C) *Uses permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

(D) *Bulk and Area Regulations*

Setback lines shall meet the following minimum requirements:

From street R-O-W (when adjoining A or R district)	100 feet
From street R-O-W (when adjoining C, I, F or P districts)	50 feet
Side (when adjoining A or R districts)	50 feet
Side (when adjoining C, I, F or P districts)	25 feet

Rear (all districts) _____ 25 feet

(Ord. No. 2516, § 3, 4-3-79)

(E) *Reserved.* (Ord. No. 2516, § 4,4-3-79)

(F) *Height Regulations*

There shall be no maximum height limits in I-2 Districts, provided, however, that any building which exceeds the height of 25 feet shall be set back from any boundary line of any Resident 1 District a distance of one foot for each foot of height in excess of 25 feet.

(X) DISTRICT R-O RESIDENTIAL—OFFICE

(A) *Purposes*

The Residential—Office District is designed primarily to provide area for offices without limitations to the nature or size of the office, together with community facilities, restaurants and compatible residential uses. (Ord. No. 2414, § 1, 2-7-78)

(B) *Uses Permitted*

Unit 1—City-wide uses by right

Unit 5—Government facilities

Unit 8—Single family and two family dwellings

Unit 12—Offices, studios and related services

Unit 25—Professional offices

(Ord. No. 1832, § 1, 11-1-71; Ord. No. 2414, § 2, 2-7-78)

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 3—Public protection and utility facilities

Unit 4—Cultural and recreational facilities

Unit 9—Multi-family dwelling medium density

Unit 10—Multi-family dwelling-high density

Unit 13—Eating places

(Ord. No. 2414, § 3, 2-7-78)

(D) *Bulk and Area Regulations*

The minimum lot width, lot area and land area per dwelling unit for residential structures shall be the same as those in the R-3 district.

Setback lines shall mee the following minimum requirements:

From street R-O-W	30 feet
From street R-O-W if parking is allowed between the R-O-W and the building	50 feet
From side property line	10 feet
From side property line when contiguous to a R-1, R-2 or R-3 district	15 feet
From back property line	25 feet
From center line of public alley	10 feet

(Ord. No. 2414, § 4, 2-7-78; Ord. No. 2603, § 4, 2-19-80; Ord. No. 2621, § 1, 4-1-80)

(E) *Building Area*

On any lot the area occupied by all buildings shall not exceed sixty (60) per cent of the total area of such lot.

(F) *Height Regulations*

There shall be no maximum height limits in R-O Districts, provided, however, that any building

which exceeds the height of twenty (20) feet shall be set back from any boundary line of any R-1, R-2 or R-3 District an additional distance of one foot for each foot of height in excess of twenty (20) feet. (Ord. No. 2414, § 5, 2-7-78)

(XI) DISTRICT P-1. INSTITUTIONAL

(A) *Purposes*

The institutional district is designed to protect and facilitate use of property owned by larger public institutions and church related organizations.

(B) *Uses Permitted*

Unit 1—City-wide uses by right

Unit 4—Cultural and recreational facilities

(C) *Uses Permissible on Appeal to the Planning Commission*

Unit 2—City-wide uses by conditional use permit

Unit 3—Public protection and utility facilities

Unit 10—Multifamily dwelling—high density

(D) *Bulk and Area Regulations*

Setback lines shall meet the following minimum requirements:

From street row	30 feet
From street row if parking is allowed between the row and the building	50 feet
From side property line	20 feet
From side property line when contiguous to a residential district	25 feet

From back property line	25 feet
From center line of public alley	10 feet

(E) *Building Area*

On any lot the area occupied by all buildings shall not exceed sixty (60) per cent of the total area of such lot.

(F) *Height Regulations*

There shall be no maximum height limits in P-1 District, provided, however, that any building which exceeds the height of 20 feet shall be set back from any boundary line of any Residential District a distance of one (1) foot for each foot of height in excess of 20 feet. (Ord. No. 2603, § 5, 2-19-80; Ord. No. 2621, § 2, 4-1-80)

(XII) F-1. FLOOD DISTRICT

(A) *General regulations*

Type of Construction: Any permitted building shall be of a type of construction which is not appreciably damaged by flood waters. Any permitted structure shall be firmly anchored to prevent the same from floating away and thus threatening to further restrict bridge openings and other restricted sections of the water courses. *Floatable Materials:* It shall be unlawful to place any materials which in time of flood might float away and lodge against bridge abutments or otherwise serve materially to restrict the flood discharge capacity of the drain channel.

Reclamation: Nothing herein shall be so construed as to prohibit the lawful rehabilitation or reclamation of any lands within a Flood Supplemental District.

(B) *District Regulations*

After the effective date of this ordinance, it shall be unlawful in an F-1 District to:

1. Construct, reconstruct, move or alter any residence unless the elevation of the lowest habitable floor is at least two feet above the elevation of the maximum probable flood, as determined by a registered professional engineer;

2. Construct, reconstruct, move or alter any structure, make any excavation or place any fill or materials which may materially restrict the flood discharge capacity of the drain channel. The Planning Commission shall establish appropriate standards governing permitted ground coverage in F-1 Districts, after obtaining and considering recommendations thereon by the City Engineer;

3. Construct, reconstruct, move or alter any structure for residential occupancy, other than temporary facilities, provided that this ordinance shall not be interpreted to prevent routine maintenance of residential structures existing at the effective date of this ordinance;

4. Construct, reconstruct, move or alter any enclosed place of public assemply, enclosed recreational facility, or transient accommodation, unless the elevation of the lowest floor, except for elevators, stairwells and appurtenant lobbies, is at least two feet above the elevation of the maximum probable flood, as determined by a registered professional engineer.

ARTICLE 6. USE UNITS

(A) *Use Units Established*

Listing. The various use units referred to in the zoning district provisions are herein listed in numerical order. Within the use units, the per-

mitted uses are ordinarily listed in alphabetical order. In these use units where there is a preliminary descriptive statement (which may mention specific uses) in addition to the detailed list of uses, the detailed list shall govern.

(B) *Interpretation of Use Units*

In each use unit section, permitted uses are set forth in the subsection entitled "Included Uses." In the event of a conflict between subsections and the "description" subsection, the former shall prevail.

In any case where there is a question as to whether or not a particular use is included in a particular use unit, the Planning Administrator shall decide. A use shall not be interpreted as being in any use unit if it is specifically listed in another unit in this article. (Ord. No. 2181, § 1, 1-6-76)

(C) *Off-Street Parking Space Requirements*
One per 1200 square feet of floor area

(XXIV) UNIT 24. OUTDOOR ADVERTISING

(A) *Description*

Unit 24 consists of outdoor advertising signs (billboards) on which space is leased or rented by the owners thereof to others for the purpose of conveying an advertising message. Outdoor advertising is set forth as a single use unit in order to provide maximum control over the location of outdoor advertising signs. (Ord. No. 1893, § 1, 12-91-71; Ord. No. 2126, § 3, 7-15-75)

EDITOR'S NOTE—See the editor's footnote to Ch. 17B.

(XXV) UNIT 25. PROFESSIONAL OFFICES

(A) *Description*

Unit 25 consists of small professional offices that are compatible with medium and high density residential areas.

(B) *Included Uses*

Office for no more than four (4) doctors

Office for no more than four (4) dentists

Insurance sales

Studio for teaching any of the fine or liberal arts

Photography studio

Welfare agencies

Architect

Engineer

Attorney

Accountant

Business or management consultant

Realtor

Broker

Interior decorator

Veterinary small animal out-patient clinic

(Ord. No. 2490, § 2, 12-5-78)

(C) *Off-Street Parking Space Requirements*

1 space per 300 feet of floor space

ORDINANCE NO. 1893

AN ORDINANCE REGULATING THE ERECTION, CONSTRUCTION, REPAIR, ALTERATION, LOCATION, OR MAINTENANCE OF SIGNS WITHIN THE CITY OF FAYETTEVILLE, ARKANSAS; THE ISSUANCE OF PERMITS AND FEES THEREFOR; THE REVOCATION OF PERMITS; INSPECTION AND FEES THEREFOR; REPEAL OF CERTAIN ORDINANCES; AND PROVIDING PENALTIES FOR VIOLATION THEREOF.

WHEREAS, the Board of Directors of the City of Fayetteville, Arkansas, believes that the construction, repair, alteration, location, and maintenance of signs should be controlled within the city limits of the City of Fayetteville, Arkansas, in order to protect the public investment in the streets and highways, to promote the safety and recreational value of public travel and to preserve natural beauty, and

WHEREAS, the purpose of this Ordinance is to promote the reasonable, orderly, and effective display of signs while remaining consistent with the city policy to protect the public investment in the streets and highways, to promote the safety and recreational value of public travel and to preserve natural beauty, and

WHEREAS, the Board of Directors has made the following findings of fact:

(1) That the uncontrolled proliferation of signs is hazardous to the users of streets and highways within the limits of the City of Fayette, Arkansas.

(2) That a large and increasing number of tourists have been visiting the City of Fayetteville, Arkansas, and as a result the tourist industry is a direct source of income for citizens of said city, with an increasing number of persons directly or indirectly dependent upon the tourist industry for their livelihood.

(3) Scenic resources are distributed throughout the city, and have contributed greatly to its economic development, by attracting tourists, permanent and part-time residents, and new industries and cultural facilities.

(4) The scattering of signs throughout the city is detrimental to the preservation of those scenic resources, and so to the economic base of the city, and is also not an effective method of providing information to tourists about available facilities.

THEREFORE, BE IT ORDAINED BY THE BOARD OF DIRECTORS OF THE CITY OF FAYETTEVILLE, ARKANSAS:

SEC. 17B-9. FREESTANDING SIGNS.

It shall be unlawful to erect any freestanding sign which total height is greater than thirty (30) feet above the level of the street upon which the sign faces. Freestanding signs located on property which abuts both a controlled access highway and a state or federal numbered highway may not be erected where the total height of said sign is greater than thirty (30) feet above the plane of the pavement of the highest road at the intersection. For any sign located closer to street right-of-way than forty (40) feet the maximum height shall be reduced one-half foot for each foot of setback less than forty (40) feet. Freestanding signs shall be permitted to be erected in the city subject to the following:

(A) *A-1 District:*

(1) Off-site freestanding signs shall be prohibited.

(2) On-site freestanding signs subject to the following:

(a) Only one on-site freestanding sign shall be permitted on a lot.

(b) Display surface area shall not exceed sixteen (16) square feet.

(c) Sign may be illuminated by indirect illumination only.

(d) Sign shall be set back thirty-five (35) feet from existing street right-of-way and twenty-five (25) feet from any R or R-O District.

(B) *R and R-O Districts:* Freestanding signs shall prohibited and no freestanding signs shall be erected in any R or R-O district of the city; provided, one freestanding bulletin board per lot shall be permitted, subject to the restrictions on bulletin boards prescribed by section 17B-6(q) of this chapter.

(C) *C Districts:*

(1) Only one on-site or off-site freestanding sign shall be permitted on a lot, at a shopping center, or at a mall.

(2) Only one off-site freestanding sign shall be permitted on any vacant property of one ownership.

(3) Freestanding signs shall be subject to the following:

(a) Display surface area shall not exceed ten (10) square feet, provided, the display surface area may be increased

two (2) square feet for each one foot the sign is set back from street right-of-way beyond fifteen (15) feet; provided further, the maximum display surface area for a sign which is set back from street right-of-way forty (40) feet or more shall be seventy-five (75) square feet; provided further, the maximum display surface area for an on-site freestanding sign located on property which abuts a controlled access highway shall be two hundred (200) square feet.

(b) Shall be set back a minimum of fifteen (15) feet from street right-of-way; provided, an on-site freestanding sign located on property which abuts a controlled access highway shall be set back a minimum of forty (40) feet from street right-of-way.

(c) Shall be set back a minimum of twenty-five (25) feet from the boundary of any R or R-O District.

(d) Signs may be illuminated by direct or indirect illumination.

(e) May be erected a minimum of one foot from adjoining property.

(4) The display surface area of joint identification signs may be increased to one square foot per five hundred (500) square feet of gross leasable building area, with a maximum display surface area of three hundred (300) square feet.

(D) *I Districts:*

(1) On-site freestanding signs shall be permitted.

(2) Off-site freestanding signs shall be prohibited.

(3) Freestanding signs shall be subject to the following:

(a) Display surface area shall not exceed ten (10) square feet; provided, the display surface area may be increased two (2) square feet for each one foot the sign is set back from street right-of-way beyond fifteen (15) feet; provided further, the maximum display surface area for a sign which is set back from street right-of-way forty (40) feet or more shall be seventy-five (75) square feet; provided further, the maximum display surface area for an on-site freestanding sign located on property which abuts a controlled access highway shall be two hundred (200) square feet.

(b) Shall be set back a minimum of fifteen (15) feet from street right-of-way; provided, an on-site freestanding sign located on property which abuts a controlled access highway shall be set back a minimum of forty (40) feet from street right-of-way.

(c) May be erected a minimum of one foot from adjoining property; provided, however, said signs must be set back twenty-five (25) feet from the boundary of any R or R-O District.

(E) *P and F1 Districts:* Freestanding signs other than those permitted in section 17B-6 shall be prohibited and no freestanding sign shall hereafter be erected in the P and F-1 Districts.

(F) *Space of off-site, freestanding signs.* No two (2) off-site, freestanding signs shall be spaced less than two hundred (200) feet apart; provided, the minimum

spacing provided hereby shall not apply to signs separated by buildings or other obstructions in such a manner that only one sign is visible from the street or highway at any one time. (Ord. No. 1893, § 1, 12-19-72; Ord. No. 2109, § 7, 6-3-75; Ord. No. 2117, §§ 1, 2, 6-17-75; Ord. No. 2269, §§ 1, 2, 9-7-76; Ord. No. 2270, § 1, 9-7-76; Ord. No. 2297, §§ 1, 2, 12-21-76; Ord. No. 2618, § 4, 4-18-80)

SUPREME COURT OF ARKANSAS

No. 83-67

DONREY COMMUNICATIONS CO., INC. (FORMERLY AMERICAN TELEVISION CO., INC. d/b/a DONREY OUTDOOR ADVERTISING CO.)

Appellant,

v.

CITY OF FAYETTEVILLE, ARKANSAS

Appellee.

PETITION

(Filed November 3, 1983)

Petitioner moves that the Court grant a rehearing in the captioned cause for the following reasons:

1. The opinion of the Court is in conflict with an express statute of the State of Arkansas and a controlling decision of the Court.

2. The opinion of the Court jeopardizes federal-aid highway funds apportioned to the State of Arkansas under the Highway Beautification Act of 1965, 23 USC §131.

The opinion held that all areas zoned commercial or industrial are exempt from the provisions of the Arkansas Highway Beautification Act and made specific reference to §76-2506. This section does not exempt outdoor adver-

tising signs located within zoned industrial or commercial areas from the provisions of the Act. It specifically permits outdoor advertising signs within zoned industrial or commercial areas. The Preamble to the Arkansas Act (Acts 1967, No. 640) makes clear that the Arkansas Act was passed to conform to the Federal Act and to avoid any loss in federal-aid highway funds. The Federal Highway Beautification Act specifically requires the payment of just compensation for the removal of all legal outdoor advertising signs. 23 USC §131(g). The Arkansas Act was amended in 1981 to clarify the just compensation requirement by prohibiting a municipality from removing any legal outdoor advertising signs without the payment of just compensation (Acts 1981, No. 923). If outdoor advertising signs located within zoned commercial or industrial areas within a municipality are exempt from the Arkansas Act, the 1981 Amendment is meaningless.

The U.S. Department of Transportation, charged with enforcement of the Federal Highway Beautification Act, has interpreted the Federal Act to require the payment of just compensation for the removal of all lawfully erected signs adjacent to the controlled highway systems, whether by state or local action, and has specifically rejected the use of amortization to effect such removal. Attached hereto is a copy of a letter by the Chief Counsel of the Federal Highway Administration regarding the Court's opinion in this case. This letter makes clear that the removal of Appellant's signs adjacent to controlled highways within the City of Fayetteville, without the payment of just compensation, does not conform with the Federal Act and could subject the State of Arkansas to a reduction in federal-aid highway funds. Counsel for Petitioner is familiar with Rule 29(h) of the Rules

of the Supreme Court but believes that the possible effect of the Court's opinion on the State of Arkansas warrants the attachment of the letter.

In *City of Fayetteville vs. S&H, Inc.*, 547 SW2d 94 (1977), this Court held the amortization provision of Ordinance No. 1893 to be in violation of Article 2, Section 22 of the Arkansas Constitution as applied to on-site signs used in connection with a going business. As applied to Appellant, the amortization provision of Ordinance No. 1893 not only results in the uncompensated removal and loss of 60 billboards, it destroys Appellant's "standardized" outdoor advertising business. Appellant's signs are not merely used in connection with a business, the signs constitute the business. Under the clear holding in *S&H*, supra, the ordinances as applied to Appellant are in violation of Article 2, Section 22, of the Arkansas Constitution.

The undersigned counsel for Petitioner certifies that he believes there is no merit in the Petition and it is not filed for the purpose of delay.

Cypert & Roy
P. O. Box 1400
Springdale, AR 72764

George O. Kleier and Richard F. Cooper
P. O. Box 1359
Fort Smith, AR 72902

By /s/ George O. Kleier

Attorneys for Appellant

(Certificate of Service Omitted in Printing)

U. S. Department of Transportation
Federal Highway Administration
400 Seventh St. S.W.
Washington, D. C. 20590

HCC-40

(October 31, 1983)

Mr. Eric M. Rubin
Rubin, Winston & Diercks
1730 M Street, N.W.
Suite 708
Washington, D. C. 20036

Dear Mr. Rubin:

This letter is in response to your letter of October 20, regarding a decision by the Supreme Court of Arkansas in *Downey Communications vs. City of Fayetteville*, (No. 83-67 October 17, 1983). You ask for an expeditious response in order that you can use it to file a petition for rehearing by November 3.

Our review of the decision indicates that the Court has construed the Arkansas Highway Beautification Act, Ark. Stat. §76-2501 *et seq.*, in a way that could subject the State to a penalty under the Federal Highway Beautification Act, 23 U.S.C. §131, if signs are removed without the payment of just compensation that is required by Federal law. See 23 U.S.C. §131(b).

The Federal Highway Beautification Act requires States to control signs adjacent to Interstate and Federal-aid primary highways. The required controls are set forth in 23 U.S.C. §131(c). Off-premise signs in commercial and industrial areas permitted pursuant to 23 U.S.C. §131(d) are not exempt from controls under the remain-

ing sections of the Act but are allowed only pursuant to Federal/State agreements regulating the size, lighting and spacing of signs in these areas.

Current Federal law rejects the use of amortization to remove lawfully erected signs adjacent to the two controlled highway systems. The compensation requirements are set forth in 23 U.S.C. §131(g). Thus, owners of signs lawfully erected which do not conform to §131(c) must receive compensation upon removal if a State is to be in compliance with Federal law. Signs in commercial and industrial areas that are permitted under §131(d) but do not conform to §131(c) would also fall within the compensation requirements of §131(g).

We trust this letter responds to your concerns. We have provided a copy of this letter to the State of Arkansas.

Sincerely yours,

/s/ DONALD L. IVERS
Chief Counsel

cc:
Thomas B. Keys—Chief Legal Counsel
Arkansas Department of
Transportation

No. 81-9378-AS

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY
OF MACOMB

ELLER OUTDOOR ADVERTISING COMPANY OF MICHIGAN, an Arizona Corporation, and McCULLAGH LEASING, INC., a Michigan Corporation,

Plaintiff,

v.

CITY OF ROSEVILLE, a Michigan Municipal Corporation, and GEORGE HICKMAN,

Defendants.

OPINION

This matter is before the Court for decision following a bench trial on November 12, 18, and 19, 1982. The parties have filed proposed findings of fact and conclusions of law, and trial briefs.

Plaintiffs filed this complaint for declaratory and injunctive relief on April 24, 1981, challenging the constitutionality of Roseville's Ordinance which limits the size and placement of freestanding off-premises signs to 300 square feet and to vacant property only.

FINDINGS OF FACT

Plaintiff, now named Gannett Outdoor Company of Michigan (for purposes of this opinion referred to as "Eller"), is engaged in the business of erecting advertising billboards and charging advertisers to display messages.

McCullagh is an automobile leasing company owning approximately 23 acres of land in the City of Roseville

abutting the T-94 freeway, 13 Mile Road, Little Mack and a sand and gravel operation. There is no contiguous residential property. McCullagh has located, thereon, a regional headquarters, a "rent-a-car" building, and fenced parking for vehicles used in its operation. A large portion of the 23 acres remains unused and unimproved except for fences and lighting.

On June 6, 1980, Eller and McCullagh entered into a lease whereby Eller would have the right to erect a billboard on McCullagh property adjacent to the I-94 expressway. It provided the lease would be effective on the date a permit from the City of Roseville was obtained.

Roseville is a Michigan municipal corporation of approximately 9.9 square miles and a population of approximately 52,000. Thirty percent of the City is residential, while approximately seven percent is industrial and seven percent commercial.

Prior to Eller's application for a permit to build a sign on McCullagh's premises, Roseville amended its sign ordinance. It's text for purposes of this litigation was admitted into evidence as Defendant's Exhibit I.

Eller applied to the City of Roseville Building Department for a building permit to erect a sign on McCullagh's property. George Hickman, Roseville's Building Inspector, denied the permit because the request did not meet the "vacant land" requirement of the ordinance as defined by Hickman and the City Assessor.

The purpose of billboards is to convey messages to drivers on adjacent highways. The messages are commercial, political, public service, and editorial. Eller has

a practice of using unrented sign space for editorial comment of its choice. Editorial signs are erected and maintained at Eller's cost.

The billboard industry is standardized by size. On secondary streets "poster" signs are used. The outside dimensions of posters are approximately 12′ x 12′, the message area 9′ x 7′. It is called a 300 square foot sign although the message area is only 200 square feet. This type of sign uses glued-on paper messages. On freeways, painted bulletin signs are customarily used. These signs have a hand-painted display uniformly 14 x 48 feet. The message area is 672 square feet. Eller also erects custom spectacular signs which generally have an unusual configuration, like the sign which is used to count off automobile production. Eller has eighty custom signs in the Detroit area, three hundred fifty bulletins, and twenty-five hundred posters.

The industry standardizes signs because clients are national or regional advertisers. A particular design is printed and shipped to any part of the country where it will fit a standard size billboard.

Plaintiffs' evidence shows that two foot letters are optimal on a freeway sign. Ordinarily, messages with two foot letters require the use of bulletin size signs. Placing the same message on a poster size sign would require reduction of the letters to less than one-half the original size. The evidence indicates there is no relationship between sign size and traffic safety. However, it does suggest a smaller sign could reduce traffic safety because drivers would be required to divert their attention from the road for a greater period of time than that required for larger signs.

The evidence also shows the viewing and comprehension of messages by drivers is directly related to the size of the letters. Not only are drivers able to read the messages at greater distances but also need not turn their heads because the larger letters remain in their cone of vision. Drivers would have to turn their heads to read smaller letters on 300 square foot signs.

Eller owns only five percent of properties on which signs are erected. The remainder are on leased property. It would be financially impossible for Eller to locate a sign on vacant land, with a clause calling for its removal upon the owner's decision to build on the lot. Ninety-five percent of its signs are located on developed property so Eller has reason to believe the sign's location will be stable. It costs approximately $9,000 for Eller to erect a poster size sign and $40,000 to erect a bulletin size sign. There is no practical impediment to placing a sign on land with an existing structure.

Roseville offered Dennis J. Meagher, vice-president of Community Planning and Management, P.C., as an expert witness.

Defendant's evidence shows Roseville's goal is to have smaller signs which would fit within a developed urban community of one and two story buildings and very little vacant land. The purpose of the vacant land requirement is to prevent infringement with another use —overshadowing buildings or businesses. The signs would overpower low buildings and industrial properties. Signs would also contrast with good taste and affect adjoining property.

Buildings in Roseville's heavy industry zones are allowed to be sixty feet high and forty feet high in light

industrial zones. Roseville's witness admitted there would be nothing overpowering about a sign located on McCullagh's property. Roseville's Building Inspector stated the Ordinance was amended to include the vacant property requirement when a businessman complained a sign erected by National Advertising Co. damaged his property by interfering with his view. The Building Inspector knew of no other purpose of the amendment. Roseville determined a property was vacant by examining the legal description to see if any buildings were located within the description. If so, the property is not vacant.

CONCLUSIONS OF LAW

Plaintiff challenges two restrictions of the Roseville Sign Ordinance: (1) The vacant property limitation and (2) The maximum size limitation of 300 feet. Plaintiff's challenge falls into natural categories which will be analyzed seriatim: (1) First Amendment to the United States Constitution; (2) Equal protection; (3) Due process; and (4) Interpretation of the term "vacant."

I. FIRST AMENDMENT

Plaintiff argues the vacant property and 300 square foot restrictions do not advance any of the purposes of the present Ordinance and restrict speech further than is necessary to obtain Roseville's objectives. Plaintiff suggests Roseville has the burden of demonstrating a compelling state interest to support its restrictions on speech.

In *Metromedia, Inc. vs. San Diego*, 453 U.S. 490; 101 S. Ct. 2882; 69 L. Ed. 2d 800 (1981) the United States Supreme Court addressed the First Amendment as ap-

plied to the unique forum of expression via billboards. The Court recognized that billboards are a well-established medium of communication, used to convey a broad range of different messages, both commercial and non-commercial. It also noted the inherent tension between the governmental interest in controlling the medium of communication and the First Amendment's interest in protecting the communication. The Court applied a four-part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech: (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. 453 U.S. at p. 507.

There is no dispute in the instant case that the speech sought by Eller concerns lawful activity and is not misleading. The dispute lies in the application of the remainder of the test.

The governmental interests advanced by Roseville are traffic safety and aesthetics — preventing conflicts with other buildings, lowering of property values and offending good taste.

The restrictions on speech are the limitation of signs to 300 square feet in maximum area and the prohibition of signs except "on vacant property only." Plaintiff offered no evidence at trial that the restrictions effectively exclude billboards from the City of Roseville.

The evidence at trial shows the 300 square moot limitation has no relationship to the safety of traffic on the adjoining freeway. Defendant's own witness admitted there is no provable relation. Plaintiff offered persuasive evidence that the smaller sign required by Roseville in fact reduces traffic safety by reducing readability and correspondingly increasing the amount of time a driver would have to divert his or her attention from the roadway in order to read the sign. The evidence also shows the 300 square foot limitation severely restricts communication by the billboard medium because advertising campaigns are regional and national in scope using bulletin size standardized messages which cannot be custom tailored to the smaller signs required by Roseville.

The 300 square foot limitation arguably advances the other governmental interest advanced by Roseville — aesthetics. A 672 square foot sign, being larger, may well be considered more unsightly by the legislative body of Roseville.

Michigan courts have held aesthetics cannot be the sole force behind sign ordinances. *Wolverine Sign Works vs. Bloomfield Hills,* 279 Mich. 205; 271 N.W.2d 823 (1937); *Sun Oil Co. vs. Madison Heights,* 41 Mich. App. 47, 53; 199 N.W.2d 525 (1972).

While the 300 square foot limitation directly advances the governmental interest of local aesthetics, the Court finds it insufficient to justify the restriction on commercial and non-commercial speech imposed. The sign proposed by Eller would be located on 23 acres of commercial property, with large open spaces, next to a gravel pit and other commercial businesses. There is no evidence the sign would overwhelm any buildings in the

vicinity. There are no residential homes near enough to be affected by the sign.

The vacant land restriction in no way advances traffic safety. It arguably could advance the aesthetic governmental interest by preventing a sign from overpowering a small building. However, as applied to Plaintiff's proposal, the provision, does not advance any such interest. The sign would be far from the nearest building and would be lower in height than buildings allowed in the Zoning Ordinance and cranes operating in the vicinity. The prohibition is far broader in scope than is necessary to reach the "evil" legislated against.

For these reasons, the Court holds both limitations unconstitutionally restrict commercial and non-commercial speech contrary to the First and Fourteenth Amendments of the United States Constitution.

II. EQUAL PROTECTION

Plaintiff argues the restriction of off-premise signs to vacant property denies Plaintiff equal protection under the law because it distinguishes between signs based on content, yet content has no relationship to the asserted goals. Essentially, Plaintiff challenges the distinction between on-premise and off-premise signs.

Plaintiff's challenge is to be tested under the question posed by the Michigan Supreme Court in *Alexander vs. City of Detroit*, 392 Mich. 30, 36; 219 N.W.2d 41 (1974): "Are all persons of the same class included and affected alike or are immunities or privileges extended to an arbitrary or unreasonable class while denied to others of like kind?"

The Court finds the distinction between off-premise and on-premise signs does not violate equal protection. The separate classifications are based on natural distinguishing characteristics. On-premise signs are those which advertise a business on the business property. It is defined as one "which carries only advertisements strictly incidental to a lawful use on the premises." Roseville Ordinance §3-1601(15). Such signs have a different scope, use and intent than the larger signs employed by Plaintiff in its business.

III. DUE PROCESS

Plaintiff argues due process requires that ordinances have a real and substantial relation to the promotion of the welfare, safety, health, or morals of the community. Plaintiff asserts the Ordinance challenged fails this test.

An Ordinance is not a valid exercise of the police power and violates due process when it has no reasonable basis for its very existence. A reasonable basis is defined as including protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public or any substantial portion of the public. *Robinson Township vs. Knoll*, 410 Mich. 293, 312; 302 N.W.2d 146 (1981); *Cady vs. City of Detroit*, 289 Mich. 499; 286 N.W. 805 (1939).

An Ordinance is presumed to be constitutional. The goal of Roseville's Ordinance is traffic safety and aesthetics. As stated earlier, the Court finds no reasonable basis for either restriction as to traffic safety. The square footage limitation in fact reduces traffic safety. The vacant property limitation was shown by the evidence to be unrelated to safety, being advanced only for the preservation of view, good taste, and property values for adjoining landowners.

As stated previously, aesthetics may be an incidental purpose of an Ordinance but cannot be the moving factor. *Wolverine Sign Works, supra.* Since the Court finds aesthetics to be the sole viable purpose of the dual restrictions, it concludes there is no reasonable basis for the restrictions. The Ordinance is not a valid exercise of Roseville's police power.

IV. DEFINITION OF VACANT LAND

Plaintiff also asks the Court to construe the term "vacant" which was undefined by the Ordinance.

In view of the Court's previous holdings, it is unnecessary to reach this question.

V. CONCLUSION

The Court holds the Roseville Ordinance unconstitutionally restricts the exercise of commercial and non-commercial speech and violates due process of law under the Michigan and United States Constitutions. A judgment granting Plaintiff declaratory and injunctive relief consistent with this opinion will enter pursuant to G.C.R. 1963, 522.

/s/ Robert J. Chrzanowski,
Circuit Judge

Dated: April 26, 1983

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Case No. 81 9378 AS

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

ELLER OUTDOOR ADVERTISING COMPANY OF MICHIGAN, an Arizona Corporation, and McCULLAGH LEASING, INC., a Michigan Corporation,

Plaintiffs,

vs.

CITY OF ROSEVILLE, a Michigan Municipal Corporation, and GEORGE HICKMAN,

Defendants.

ORDER GRANTING DECLARATORY AND INJUNCTIVE RELIEF

At a session of said Court, held in Macomb County, Michigan on May 12, 1983

PRESENT: HONORABLE ROBERT J. CHRZANOWSKI, Circuit Judge

In accordance with the findings and conclusions stated in the Court's Opinion dated April 26, 1983.

IT IS HEREBY DECLARED that the sign ordinance of defendant City of Roseville, insofar as it restricts off-premise signs to a maximum size of 300 square feet, unconstitutionally restricts commercial and noncommercial speech contrary to the First and Fourteenth Amendments of the United States Constitution and further violates due process, and therefore is null and void and without effect.

IT IS HEREBY FURTHER DECLARED that the sign ordinance of defendant City of Roseville, insofar as

it restricts off-premise signs to vacant property only, unconstitutionally restricts commercial and noncommercial speech contrary to the First and Fourteenth Amendments of the United States Constitution and further violates due process, and therefore is null and void and without effect.

IT IS FURTHER ORDERED that defendants forthwith issue to plaintiff Gannett Outdoor Company of Michigan all municipal permits necessary for the erection of an outdoor advertising sign, in the industry standard dimensions of 14 feet x 48 feet, on the property of McCullagh Leasing, Inc., in the City of Roseville.

/s/ Robert J. Chrzanowski
Circuit Judge

A TRUE COPY
/s/ Edna Miller
County Clerk

/s/ Margaret Dunford
Deputy Clerk

Approved for Entry:

LaBarge & Dinning, P. C.
/s/ J. Russell LaBarge, Jr.
Attorney for Defendants
Roseville Theatre Building
Roseville, Michigan 48066

No. 81-9378-AS

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

ELLER OUTDOOR ADVERTISING COMPANY OF MICHIGAN, an Arizona Corporation, and McCULLAGH LEASING, INC., a Michigan Corporation,

Plaintiffs,

VS.

CITY OF ROSEVILLE, a Michigan Municipal Corporation, and GEORGE HICKMAN,

Defendants.

AMENDED OPINION CORRECTING SIGN DIMENSIONS

The third sentence of the first paragraph on page three is corrected to read that the dimensions of "poster" signs are approximately 12′ x 25′, the message area being 9′7″ x 21′7″.

/s/ ROBERT J. CHRZANOWSKI
Circuit Judge

Dated: May 18, 1983
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83 CIVIL 372

IN THE COURT OF COMMON PLEAS
OF LACKAWANNA COUNTY

PATRICK OUTDOOR MEDIA, INC.

Appellant

VS.

BOROUGH OF DICKSON CITY

Appellee

KOSIK, P.J.
ZONING APPEAL

MEMORANDUM AND ORDER

This is an appeal from the denial by the Dickson City Borough Council of the appellant's application for a curative amendment to the zoning ordinance.

The appellant applied for a building permit to construct an outdoor advertising structure on land which was leased by them in the Borough of Dickson City. The request was denied by the Borough Building Inspector by letter dated September 20, 1982. The stated reason was that the proposed gross surface area of the billboard exceeded 100 square feet, the amount permitted in a C-3 zone under the zoning ordinance. The appellant then requested a curative amendment to the zoning ordinance on October 18, 1982. A hearing on the request was conducted by the Borough Council on December 14, 1982, and the Borough denied the request on January 11, 1983. The present appeal followed.

The appellant takes issue with the Dickson City Zoning Ordinance in two respects, to wit:

(1) that the ordinance is exclusionary in that it totally prohibits the construction of off-site advertising in the Borough; and

(2) that it constitutes a de facto exclusion of such off-site advertising in that it permits only advertising signs with a gross surface area of 150 square feet or less.

DISCUSSION AND CONCLUSIONS

I.

Where the court takes no additional evidence on an appeal from the decision of a zoning board, the scope of

the court's review is whether or not the Board abused its discretion or committed an error of law. *Soble Construction Co. vs. Zoning Hearing Board of East Stroudsburg*, 16 Pa. Commonwealth Ct. 599, 329 A.2d 912 (1974).

The appellant takes the position that the Borough Zoning Ordinance is unconstitutional in that it amounts to a total exclusion of outdoor advertising signs. The law is well-settled that a challenge to the constitutionality of a zoning ordinance must overcome a presumption of its validity. *Beaver Gasoline Co. vs. Osborne Boro, et al.*, 445 Pa. 571, 285 A.2d 501 (1971). However, the appellate courts of this Commonwealth have recognized that the total prohibition of a legitimate business use from an entire municipality must bear a more substantial relationship to the public health, safety, morals and general welfare than a partial prohibition where the business is permitted in another district of that municipality. *Exton Quarries, Inc. vs. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967); *Daikler vs. Zoning Board of Adjustment*, 1 Pa. Commonwealth Ct. 445, 275 A.2d 696 (1971). The *Daikler* court further stated that "where there is a total exclusion, *no matter how it is accomplished*, the municipality must bring forward sufficient and valid reasons for the prohibition." 1 Pa. Commonwealth Ct. at 454, 275 A.2d at 699-700 (emphasis provided). See also *Beaver Gasoline Co.*, 445 Pa. 571, 285 A.2d 501 (1971).

The burden of proof in cases of total exclusion will not shift to the municipality, however, where the prohibited land use may be characterized as "particularly objectionable." *Appeal of Green & White Copter, Inc.*, 25 Pa. Commonwealth Ct. 445, 360 A.2d 283 (1976).

In the case of advertising signs, the courts have acknowledged the power of municipalities to regulate and prohibit them within certain zoning districts; *Norate Corp., Inc. vs. Zoning Board of Adjustment,* 417 Pa. 397, 207 A.2d 890 (1965); but have refused to characterize them as "inherently obnoxious" structures not entitled to constitutional protection. *Daikler,* supra, at 1 Pa. Commonwealth Ct. 449, 275 A.2d 698; *Amerada Hess Corp. vs. Zoning Board of Adjustment,* 11 Pa. Commonwealth 115, 313 A.2d 787 (1973) (revolving signs).

We will examine the facts presented herein to determine whether the appellant has met its burden of proving the total exclusion of off-site advertising from the Borough of Dickson City.

Section 5.850 of the Borough Zoning Ordinance provides in pertinent part that "signs may be erected and maintained *only when in compliance with the following provisions* . . . (emphasis provided). The permitted types of business or advertising signs are set forth in Section 5.852. The ordinance then defines the term "business sign" in Section 11.143 as being one "which directs attention to a business or profession conducted or to a commodity, service or entertainment sold or offered *upon the premises where such sign as located or to which it is affixed.*" (emphasis provided). The ordinance is devoid of any provision for the construction or maintenance of any off-site advertising signs; those which direct attention to businesses located elsewhere.

The Commonwealth Court considered a similar set of facts in the *Daikler* case, supra, at 1 Pa. Commonwealth Ct. 448, 275 A.2d 696-697, where they concluded that a review of the provisions of the ordinance, coupled with

the omission of any provision for off-site business signs, amounted to a township-wide prohibition of off-site advertising. See also *Creative Displays, Inc. vs. Township of Lower Macungie Zoning Hearing Board*, 40 Lehigh L.J. 1 (1982).

We are compelled to reach the same conclusion in the case *sub judice*. Although no explicit prohibition of off-site advertising is contained in the ordinance, the omission of any provision for such advertising has the same effect.

II.

The appellant's second contention is that the size limitations on advertising signs contained in the Borough Zoning Ordinance are a de facto exclusion of off-site advertising from the Borough. Section 5.852(a) of the Borough Zoning Ordinance provides that "no sign shall have a gross surface of more than one hundred square feet in any "C" district or more than one hundred and fifty square feet in any "M" district.

Gerard Joyce, the President and General Manager of the appellant Patrick Outdoor, testified that three hundred square feet is the "standard size of the whole outdoor advertising medium in America." (N.T. 12). In addition, the record reflects several references by both witnesses for the appellee and members of the Borough Council to the standard size billboard utilized in the off-site advertising industry, namely, three hundred square feet. There has also been judicial recognition that three hundred square feet is the standard size billboards utilized in the off-site advertising industry, and that an attempt to limit the size of signs to less than the standard is to effectively exclude outdoor

advertising from the municipality. See *Shrewbury Township vs. Glatfelter*, 87 York Leg. Rec. 41 (1973); *Creative Displays, Inc. vs. Township of Lower Macungie Zoning Hearing Board*, 40 Lehigh L.J. 1 (1982).

We are convinced that the appellant has met its burden of overcoming the presumption of the validity of the ordinance in that it has shown the ordinance to be a total exclusion of off-site advertising. The burden then shifts to the appellee to prove sufficient and valid reasons for the exclusion.

If a municipality is to sustain the validity of a total ban, it must present evidence to establish the public purpose served by the regulation. *Beaver Gasoline Co.*, supra, at 445 Pa. 577, 285 A.2d 505. In addition, it must "demonstrate that these reasons cannot be satisfied by thoughtful regulation short of prohibition and that the prohibition does not arbitrarily discriminate against that business." *Daikler*, supra at 1 Pa. Commonwealth Ct. 454, 275 A.2d 700.

The appellee advances two reasons in support of its prohibition of off-site advertising. The first is that there are fourteen (14) billboards utilized for off-site advertising currently existing within the Borough as non-conforming uses.

The existence of non-conforming uses within a municipality will not cure the failure of a zoning ordinance to provide for such uses as a matter of right, although they "may constitute an element in a total environmental picture justifying an exclusion." *Township of Paradise vs. Mount Airy Lodge, Inc.*, — Pa. Commonwealth —, 443 A.2d 849, 853-854 (1982) (citations omitted).

In this case the appellee introduced two witnesses in support of their position. Both testified that at the time the zoning ordinance was adopted, a determination was made by the Planning Commission and the Borough Council that fourteen billboards were enough, and that no more would be permitted.

The witnesses established that there are some thirty-seven (37) miles of roadway in the Borough of Dickson City, and one estimated that the lands adjacent to approximately seven (7) miles of that roadway are zoned for commercial use. No testimony was offered as to the number of miles of land adjacent to the roadways which was zoned for manufacturing use. In addition, no testimony was offered to establish the density of the billboards existing as non-conforming uses along the roadways in commercial and manufacturing zones.

The second justification advanced by the Borough is that the billboards are a distraction to drivers in the Borough, and are therefore a safety hazard to motorists. William Stadnitski, the Borough's Police Chief, testified that in his opinion, "80% of our accidents on Route 6 is because of inattentiveness of the driver where they turn their head for one second and you have an accident." (N.T. 40). However, he admitted that, of some three hundred auto accidents which occurred on Route 6 in Dickson City during 1982, not one was ever attributed to the distraction of the driver's attention by a billboard. He also admitted that off-site advertising signs were no more distracting in any case than on-site signs.

A review of the transcript of testimony taken before the Borough Council reveals that no justification was ad-

vanced by the Borough in support of the size restrictions on advertising signs contained in the ordinance.

We find the justifications offered by the appellee in support of their exclusion of off-site advertising from the Borough to be unpersuasive. The testimony presented by the appellee was, at best, speculative. We therefore hold that the Borough has not met its burden of proving that the exclusion bears a substantial relationship to the public health, safety, morals and general welfare. While we believe that the thoughtful regulation of off-site advertising is both necessary and desirable, a blanket prohibition of such advertising in the Borough of Dickson City is unconstitutional.

ORDER

NOW, this 21 day of September, 1983, it is hereby

ORDERED that the Zoning Appeal of Patrick Outdoor Media, Inc. is sustained.

BY THE COURT
/s/ Kosik, P.J.

For Appellant: James J. Gillotti, Esquire

For Appellee: John P. Pesota, Esquire

Pursuant to Rule 28.1 of the Rules of the Supreme Court, petitioner makes the following disclosure. After this litigation began, petitioner was absorbed by Donrey, Inc. Donrey, Inc. owns partial interests in Sun Printing Company, Progress Publishing Company and Overthrust Cablevision, Inc.